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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1924~~ 1925

No. ~~218~~ 33

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, BY, &c.

No. ~~218~~ 34

JAMES C. DAVIS, DIRECTOR GENERAL, PLAINTIFF IN
ERROR,

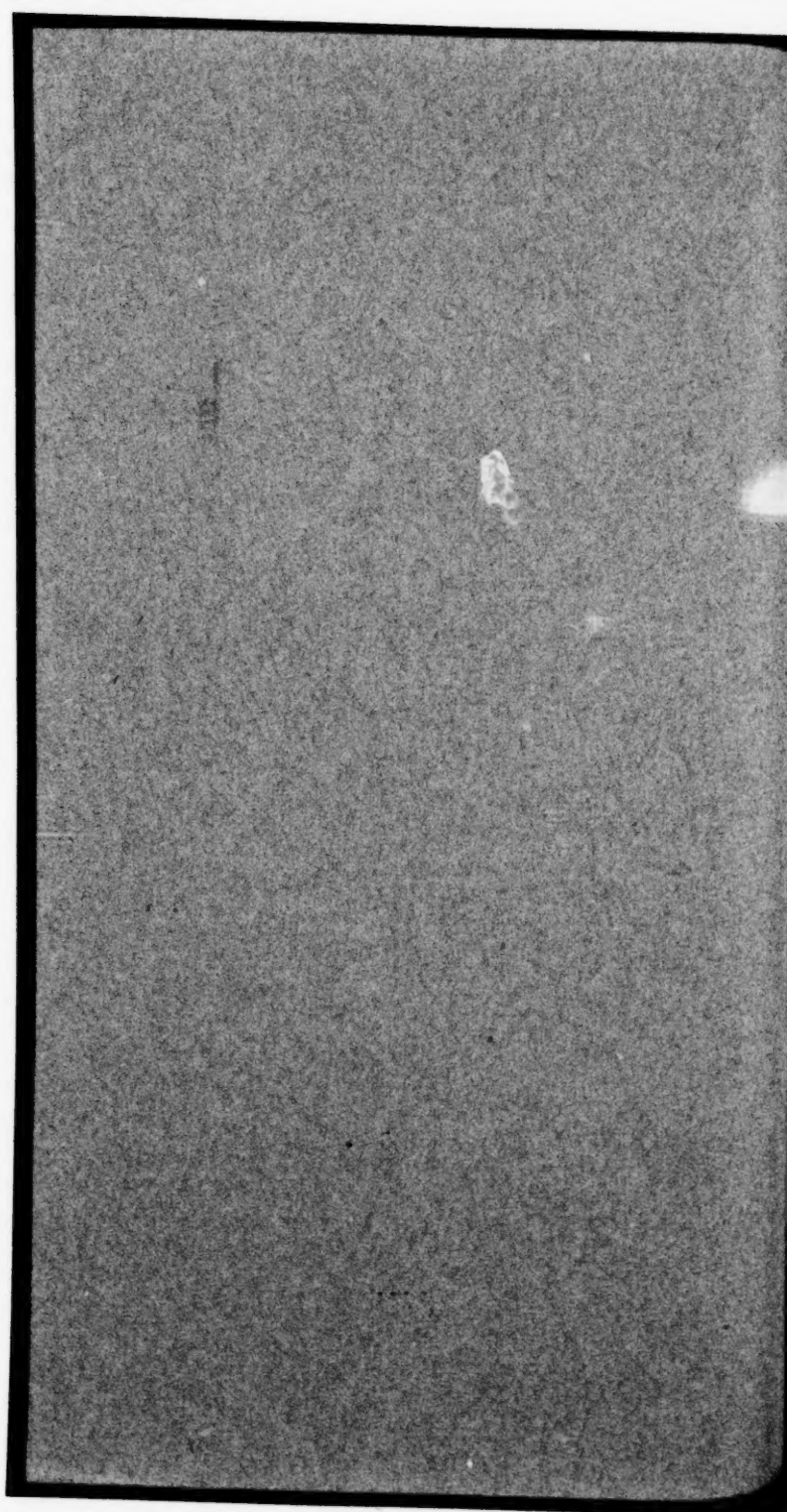
vs.

COMMONWEALTH OF KENTUCKY, BY, &c.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY

PRINTED BY THE UNITED STATES GOVERNMENT

(20,753, 20,754)



(30,723, 30,724)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 758

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, BY, &c.

No. 759

JAMES C. DAVIS, DIRECTOR GENERAL, PLAINTIFF IN
ERROR,

vs.

COMMONWEALTH OF KENTUCKY, BY, &c.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY

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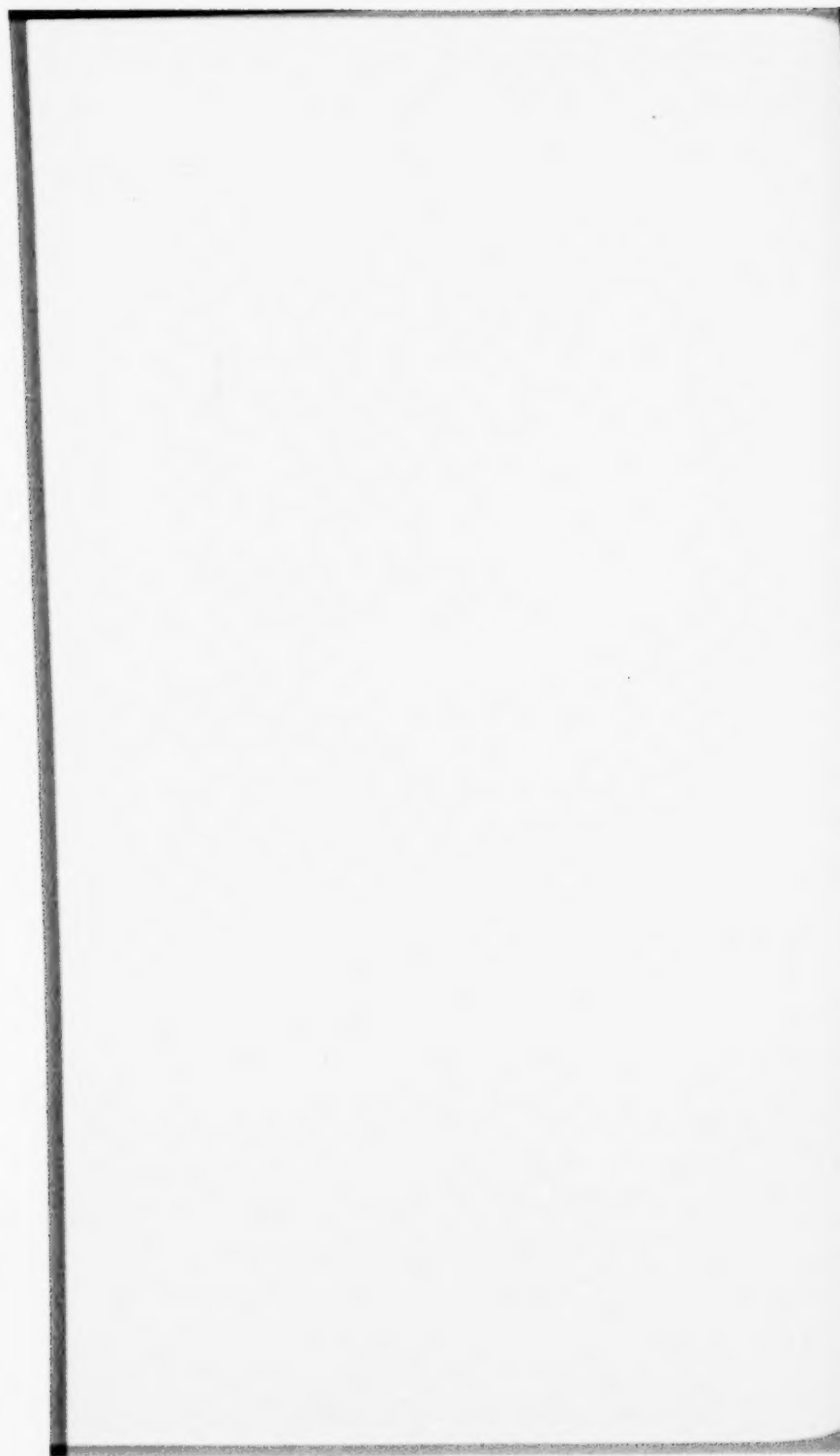
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[Caption omitted]

[fol. 2] **IN COUNTY COURT OF WOODFORD COUNTY,
KENTUCKY**

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

And

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, etc., Defendants

JUDGMENT—Filed September 29, 1920

Came the parties and filed stipulations and by consent these two cases are heard together and the case being submitted to the Court and the Court beind advised it is adjudged *the* the Court that the [fol. 3] Plaintiff's Petition be dismissed and that the plaintiff take nothing thereby to all of which plaintiff excepts and prays an appeal which is granted.

A true copy:

Attest:

D. H. Gray, Clerk of Woodford County Court, by Jno. M.
Gray, D. C.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Kentucky, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant

The plaintiff, Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky.

The defendant, Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person: and was at all times

herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties in this state as well as other states in the Union. During the year ended June 30th, 1914, said defendant operated, owned, leased, and controlled various lines of railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided was liable for the payment of a franchise tax thereon, for the taxing year of 1915.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares each; the amount of stock paid up; the par value and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received in this state and out of this state, on business done in this State, and the entire gross receipts of the corporation, company or association in this state and elsewhere during the twelve months next before the thirtieth day of June of the year [fol. 5] in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of \$2,128,789.00, as the true and total value of its property in this State. Said assessment became final in July 1915. A copy of said report is filed as part hereof marked No. 1.

The length of the lines of said Southern Railway Company in Kentucky within this State for said year was 152.718 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$812,000.00, as the true and total value of its property in the State. Said assessment became final in June 1915. A copy of said report is filed [fol. 6] here marked No. 2. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of its lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of \$49,200.00, as the true and total value of its property in this State. Said assessment became final in June 1915. A copy of said report is filed herewith marked No. 3. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled the same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$10,450.00, as the true and total value of its property in the State. Said assessment became final in June, 1915. A copy of said report is filed as part hereof marked [fol. 7] No. 4. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment: to-wit? the franchise of the said defendant.

No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 212,148 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in fact operated, owned, leased and controlled in this State for said years the said 212,148 miles and same were a part of its total system of railroad extending into the various States of [fol. 8] the Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9,253.52 miles of railroad; and said mileage wholly within this State amounted to 2.29% thereof. The net earnings or income of said defendant for said year were \$29,093,759.00. Said net income or earnings when capitalized at 6% amount to \$484,895,980.00, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said State there was within this State 2.29% of said whole property, or \$11,104,117.00. The total value of the property of said defendant, Southern Railway Company, for said year, in this State, was \$11,104,117.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on \$3,000,439.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for the said year 1915, was or value \$8,103,678.00 and taxes on said sum are now just, due and unpaid.

Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20) per centum penalty on all state and county taxes collected in this action.

Wherefore, the plaintiff prays that the omitted portion of the franchise of the defendant as herein before set out, be assessed for taxation, for the year 1915, and certified to the Auditor of Public Accounts for collection on behalf of the State tax, and for certification and apportionment to the various collecting officers of the [fol. 9] Counties in or through which said company operates its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Pharagraph Two

The Plaintiff, Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Wood-

ford County Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties of this State as well as other States in the Union. During the year ended June 30th, 1915, said defendant operated, owned, leased and controlled various lines of railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for the taxing year of 1916.

[fol. 10] Under the Kentucky Statutes, so made and provided it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price paid at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere, during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said [fol. 11] year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of \$2,128,789, as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 5. The length of the lines of the Southern Railway

Company in Kentucky and within this State for said year was 157.038 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$1,049,012.00 as the true and total value of its property in the State. A copy of said report is here filed as marked No. 6. The length of the lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its Capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of \$49,200.00, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 7. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

[fol. 12] The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$10,450.00, as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 8. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned, operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment; to-wit: the franchise of the said defendant. No part

of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four [fol. 13] subsidiary corporations, for said year was 216.468 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in face owned, operated, leased and controlled in this State for said year the said 216.468 miles and same were a part of its total system of railroad extending into various States of said Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9272.40 miles of railroad; and said mileage wholly within this State amounted to 2.33%. The net earnings or income of said defendant for said year were \$25,817,397.00. Said net income or earnings when capitalized at 6% amount to \$430,289,950, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year.

For said State there was within this State 2.33% of said whole property or \$10,025,755.00. The total value of the property — said defendant, Southern Railway Company, for said year, in this State was \$10,025,755.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on \$3,237,451.00, being assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1916, was of value \$6,788,304.00 and taxes on said sum are now just due and unpaid.

Rowert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20%) per centum penalty on all state and county taxes collected in this action.

Wherefore the plaintiff prays that the omitted portion of the franchise of the defendant as herein before set out, be assessed for taxation, for the year 1916, and certified to the Auditor of Public Accounts for collection on behalf of the State, tax, and for certification and apportionment to the various collecting officers of the [fol. 14] counties in or through which said company operates its railroad to-wit: Anderson, Ballard, Bell Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Paragraph Three

The plaintiff Commonwealth of Kentucky, states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of

Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky, and other counties of this State as well as other States of the Union. During the year ended June 30th, 1916, said defendant operated, owned, leased and controlled various lines of railroad in Kentucky and elsewhere; and under the Kentucky Statutes, made and provided, was liable for the payment of a franchise tax thereon, for the taxing year of 1917.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for the said year to file a report with the Auditor of Public Accounts before October first thereof showing the name and principal place of business of the corporation, company or association; the kind of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; [fol. 15] the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere, during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made.

Said defendant, Southern Railway Company, failed and refused to file said report, or any report.

The Southern Railway Company, in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky has been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of \$2,128,789.00, as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 9. The length of this lines of said Southern Railway Company in Kentucky within this State for said year was 160.45 miles.

[fol. 16] The Mobile and Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it for its property and franchise so reported in the sum of \$1,049,012.00, as the true and total value of its property in the State. A copy of said report is here filed as part hereof marked No. 10. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times mentioned herein defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of \$88,800.00, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 11. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A [fol. 17] report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$10,450.00, as the — and total value of its property in the State. A copy of said report is filed as part hereof marked No. 12. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles.

No report was filed or assessment made in any way or form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said ——— embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned, operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment; to-wit, the franchise of the defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four

subsidiary corporations, for said year was 219.88 miles; and each of said miles was at all times a part of the general system of said [fol. 18] defendant extending into the various States of the Union. Said defendant in fact owned, operated, leased and controlled in this State for said year the said 219.88 miles and same were a part of its total system of railroad extending into the various States of said Union. Both in and outside of this State said defendant for said year operated, owned, leased and controlled 9251.42 miles of railroad; and said mileage wholly within this State amounted to 2.37%. The net earning or income of said defendant for said year were \$36,099,617.00. Said net income or earnings when capitalized at 6% amount to \$601,660,280.00, which last mentioned sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said State there was within this State 2.37 % of said whole property, or \$14,259,348.00. The total value of the property of said defendant, Southern Railway Company, for said year, in this State, was \$14,259,348.00; said defendant in the name of said subsidiary corporations paid taxes in Kentucky on \$3,277,051.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1917, was of value \$10,982,297.00 and taxes on said sum are now due and unpaid.

Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to a twenty (20%) per centum penalty on all state and county taxes collected in this action.

[fol. 19] Wherefore, the plaintiff prays that the omitted portion of the franchise of the defendant as hereinbefore set out, be assessed for taxation, for the year 1917, and certified to the Auditor of Public Accounts for collection on behalf of the state tax, and for certification and apportionment to the various collecting officers of the counties in or through which said company operates its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley and Woodford. That relator herein be adjudged entitled to his commission of twenty (20%) per cent penalty against the defendant on the various accounts respectively due the State and each of said counties; that defendant be required to answer the Interrogatories hereo annexed and further prays for his costs and all proper relief.

Hazlerigg & Hazlerigg, L. M. Morris, Hobson & Hobson,
W. D. Jesse, for Plaintiff.

IN COUNTY COURT OF WOODFORD COUNTY

INTERROGATORIES TO DEFENDANT—Filed March 8, 1920

I. In the statistics of Railways in the United States compiled by the Interstate Commerce Commission for the year ending June

30, 1913, opposite the name of the "Southern Railway in Kentucky" are these words:

"Merged in Southern Railway Company, July 1, 1912." Is that statement true? And if so, what charge, if any, has been made since and when?

[fol. 20] II. The defendant will answer the following interrogatories for the year ending June 30, 1914.

1. What was the total mileage of railway lines which were operated, owned, leased and controlled by defendant; including lines controlled by the ownership of a majority of the capital stock?

2. What were the names of the railways which were owned, operated, leased and controlled by defendant? Give the length of each line, including the lines operated in the name of defendant, and those operated in other names but of which defendant owned a majority of the capital stock.

3. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railways?

4. How much of the mileage disclosed in the answer to question two, was within Kentucky; and what lines within Kentucky did defendant control by owning a majority of the capital stock of the corporation in whose name it was operated?

5. Give the name of each County in Kentucky and the number of miles of railroad therein which defendant or the "Southern Railway Company in Kentucky," Mobile & Ohio Railroad, Cumberland Railroad, Cumberland Railway operated?

6. Did any other company listed in answer to question two above operate within Kentucky, If so, which of them and give the Counties in which operations were carried on and the mileage therein.

[fol. 21] 7. What was the total of the railway operating revenue for each of the roads listed in answer to question two above?

8. What was the total railway operating expenses for each of said roads?

9. What were the total railway tax accruals for each of said roads?

10. What was the total non-operating income for each of said roads?

11. What further amounts of money were deducted from income of each of said roads to determine the profit and loss for said year? Give general classification and amounts.

12. Explain briefly the nature of each of these deductions, that is, explain what the deductions represent or the nature of the expense.

13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore to defendant.

14. Name the officers of the Mobile & Ohio and state what relation, if any, each of them bore to defendant.

15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant.

16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant.

17. What interest, if any, did the defendant, Southern Railway Company, or any one or more of its subsidiaries have in the capital [fol. 22] stock, management, directorate or control of the Cincinnati-New Orleans and Texas Pacific Railway Company? Did defendant or any one or more of its subsidiaries operate, own, lease or control same?

III. The defendant will answer each of the above seventeen interrogatories for the year ending June 30, 1915.

IV. The defendant will answer each of the above seventeen interrogatories for the year ending June 30, 1916.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ORDER CONTINUING CAUSE—May 24, 1920

This day came the defendant, Southern Railway Company, and filed a demurrer to the statements if the Plaintiff, Commonwealth of Kentucky, on relation etc.

On motion of the defendant, this proceeding is now ordered to [fol. 23] be and it is hereby continued to the June, 1920, Term of this Court, and the defendant is given until that time in which to prepare its pleadings herein, with the understanding that such pleading as it may prepare and file herein does not waive said demurrer, and if it can and does prepare its answer prior to the date mentioned, it will furnish the attorneys for the plaintiff a copy thereof as soon as said answer is completed.

Said Order is endorsed Entered in Order Book No. 3, page 526.

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER—Filed May 24, 1920

The defendamt, Southern Railway Company, demurs to the statement of the plaintiff, Commonwealth of Kentucky on relation etc. because the same does not state facts sufficient to support or constitute a cause of action against it.

A. P. Humphrey, Wallace & Harris, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 24] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

MINUTE ENTRIES—June 28, 1920

This day came the defendant, Southern Railway Company, and without waiving the demurrer heretofore filed by it, herein, but expressly replying thereon, filed its answer.

Thereupon came the plaintiff and filed its reply to said answer: and it is agreed that the affirmative allegations may be and they are hereby by the defendant traversed of record.

IN COUNTY COURT OF WOODFORD COUNTY

ORDER FILING STOCKHOLDERS' REPORTS—June 28, 1920

Came the Plaintiff and tendered and moved to file herein as evidence the stockholders reports for the years 1914, 1915 and 1916, issued by the defendant, to which the defendants objected, and the motion is submitted to the Court: And the Court being advised said objections is overruled and said reports are now ordered to be and they are hereby filed, to which ruling of the Court as to each report the defendant objects and excepts and this case is continued.

Said Order is endorsed Entered in Order Book No. 4, page 543.

[fol. 25] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ANSWER—Filed June 28, 1920

The defendant, the Southern Railway Company, denies that during or for any part of the period mentioned in the first Paragraph

of the Statement it was performing service as a common carrier of passengers or freight for hire in Woodford County, Kentucky, or in any other County of Kentucky. It denies that during the year ended June 30, 1914, it operated or owned any line or lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year of 1915.

Defendant denies that under the Kentucky Statutes it was its duty to file the report details of which are given in said first Paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise whatever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchises and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it [fol. 26] was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any property of this defendant in this State, or for the purpose of escaping taxation on any property of this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being ten thousand (10,000) shares.

As to the Cumberland Railroad Company, defendant says that during the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant says that during the period in controversy there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

Defendant denies that each or any of said miles were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact—which is admitted—that the defendant owned a majority of the stock of said separate corporation—Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

The total mileage of this defendant for the period stated in the first Paragraph of the Statement is 9,395.82 miles; and the mileage of the lines mentioned in the said first Paragraph of the Statement was 212.16 miles; so that the proportion of the mileage of the said four railroads in Kentucky, to the total mileage of this defendant, operated, owned, leased and controlled, was 2.258 per cent.

Defendant denies that the net earnings or income of this defendant, including interest and dividends received from securities held by it, for said year, was the amount set forth in the first Paragraph of the Statement, or anything more than \$16,217,957.73. Defendant states that this sum capitalized at 6 per net would amount to \$270,299,295.55.

The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the first Paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant [fol. 28] hereby makes its allegations in that respect applicable to each of the Paragraphs of the Statement.

Defendant denies that the amount set out in the Statement was the true total value of the whole property of this defendant in and out of Kentucky for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year 1915, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 2

In answer to the Second Paragraph of said Statement the defendant denies that during or for any part of the period mentioned in the second Paragraph of the Statement it was performing service as a common carrier of passengers or freight for hire in Woodford County, Kentucky, or in any other county of Kentucky. It denies that during the year ended June 30, 1915, it operated or owned any lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year 1916.

Defendant denies that under the Kentucky Statutes it *as* its duty to file the report details of which are given in said second Paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise what-[fol. 29] ever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchise and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any property

of this defendant in this State, or for the purpose of escaping taxation on any property of this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendant says that in the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant says that there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

Defendant denies that each or any of said mileage were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact which is admitted that the defendant owned a majority of the stock in each of said separate corporations; Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; and the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

The total mileage of the defendant for the period set forth in the second Paragraph of the Statement was 9,523.15 miles; and the mileage of the lines mentioned in said second Paragraph of the Statement was 216.48 miles; so that the proportion of the mileage of the said four railroads in Kentucky to the total mileage of this defendant, owned, operated, leased and controlled, was 2.273 per cent.

Defendant denies that the net earnings or income of this defendant, including interest and dividends from securities held by it, for said year, was the amount set forth in the second Paragraph of the Statement, or anything more than \$13,110,019.89. Defendant states that this sum capitalized at 6 per cent would amount to \$218,500,331.50. [fol. 31] The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the second paragraph of the statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendant denies that the amount set out in the Statement as the true value of the whole property of this defendant in and out of Kentucky for said year; or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year 1916, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 3

In answer to the third Paragraph of said Statement the defendant denies that during or for any part of the period mentioned in the third Paragraph of the Statement it was performing service as a common carrier of passengers of freight for hire in Woodford County, Kentucky, or in any other County of Kentucky. It denies that during the year ended June 30, 1916, it operated or owned any line or lines of railroad in Kentucky, and denies that under the Kentucky Statutes made and provided it is liable for the payment of any franchise tax whatever for the taxing year 1917. [fol. 32] Defendant denies that under the Kentucky Statutes it was its duty to file the report details of which are given in said third paragraph of the Statement, or any report whatever.

Defendant denies that it had or exercised any franchise whatever in the State of Kentucky. It says that the said four roads mentioned in the Statement were operated under their own franchises and each of said roads filed its own report by its own officers. Defendant denies that it filed said reports.

Defendant denies that it operated or owned any of the lines of the said four subsidiary companies, and denies that it knew that it was under any duty whatever to file any report. It denies that said reports were filed for the purpose of concealing any property of this defendant in this State, or for the purpose of escaping taxation on any property of this defendant in this State; and defendant denies that it did thereby conceal any portion of its property or cause any portion of its property to be omitted from assessment, and denies that its franchise was subject in any way to assessment in Kentucky.

Defendant says that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period of controversy eighteen (18) shares of such stock in the names of the persons who were elected directors. Defendant admits that this defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendant says that in the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendant [fol. 33] says that there was outstanding in the name of its directors a sufficient quantity of stock to qualify them as such.

Defendant denies that each or any of said miles were at any time a part of the general system of this defendant extending into various states of the Union, except as to the fact which is admitted that the defendant owned a majority of the stock in each of said separate corporations; Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

The total mileage of this defendant for the period set forth in the third Paragraph of the Statement was 9,522.79 miles; and the mileage of the lines mentioned in the said third Paragraph of the Statement was 219.88 miles; so that the proportion of mileage of the said four railroads in Kentucky to the total mileage of this defendant, owned, operated, leased and controlled, as 2.309 per cent.

Defendant denies that the net earnings or income of this defendant, including interest and dividends received from securities held by it, for said year, was the amount set forth in the said third Paragraph of the Statement, or anything more than \$21,047,540.00. Defendant states that this sum capitalized at 6 per cent would amount to \$350,792,333.00.

[fol. 34] The defendant will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the third Paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendant denies that the amount set out in the Statement was the true total value of the whole property of this defendant in and out of Kentucky for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendant now denies that any portion of defendant's property in Kentucky was omitted from assessment for the year 1917, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 4

Further answering, this defendant says that for the taxing years 1915, 1916 and 1917, dealt with in the Statement herein, the assessing authorities of the State of Kentucky—The State Board of Valuation and Assessment and the Tax Commission, have uniformly established and acted upon a rule of ascertaining the value of the franchise of railroad companies subject to assessment in Kentucky, which was applied to all of said railroads. This rule was to ascertain the net earnings of the said railroad company, taxes being

deducted, and then to capitalize these net earnings at 6 per cent, and then to take 60 per cent of the amount thus arrived at, and to fix the amount thus determined as the value of the capital stock of said railroad. And this was the method uniformly applied by [fol. 35] said assessing authorities of the State of Kentucky as aforesaid, during the periods mentioned in the Statement to which this answer is a response.

The defendant further says that for each of the taxing years mentioned in the Statement herein local assessors and other assessing officers of the State of Kentucky have habitually, intentionally, systematically and generally assessed the property of individuals and of corporations within their sphere of duty, comprising 80 per cent of the total taxable property, at not exceeding 52 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually for many years past has been a matter of public notoriety in the State; that notwithstanding this the said State Board of Valuation and Assessment and Tax Commission have adopted a method which resulted in an assessment of railroad tangible and intangible property at 60 per cent of its fair cash value.

The defendant says that having ascertained the value of the capital stock of the railroads in this State subject to assessment by the above described method the taxing authorities ascertained the total mileage of all lines owned, operated, leased and controlled by said several companies, and assigned to Kentucky that proportion of the thus ascertained value of the capital stock of the lines owned, operated, leased and controlled, that the said lines in Kentucky bore to the total length of said lines. From this value of the capital stock so ascertained there was deducted the tangible property of said several railroads assessed in Kentucky.

The defendant says that it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United [fol. 36] States, particularly the Fourteenth Amendment thereof, for this Court to adopt any method in making an assessment herein (if any could be made) on a less favorable basis to defendant than the one above described.

Paragraph 5

And the defendant further says that in none of said periods did it have any tangible property in the State of Kentucky; that it had no intangible property in the State of Kentucky during said period; that if the Court should be of opinion, under all the *all the* facts and circumstances of this case, that the property in Kentucky, tangible and intangible, of the four railroads mentioned in the Statement herein, should be assessed against this defendant, then this defendant says that this assessment has already been made by the States Board of Valuations and Assessment and the Railroad Commission for each of said years; that is to say, that the tangible property of each of said corporations has been assessed; the value of the capital stock

of each of said corporations has been ascertained; the total value of tangible and intangible property of each of said companies has been ascertained and all the taxes paid thereon; that in order that the value of the capital stock of these four corporations assignable to Kentucky should be determined the said taxing authorities have taken into consideration all the facts necessary to that end, and have fixed the value of the tangible property and of the franchise of each of said corporations as aforesaid.

Defendant further says that as contributing to the earnings of [fol. 37] the defendant and to the value of its capital stock it owned and operated, in states other than Kentucky, during the said several years, many miles of double track, that is, as of June 30, 1914, 391.42 miles; as of June 30, 1915, 422.81 miles; and as of June 30, 1916, 480.20 miles; whereas all the lines in Kentucky of the corporations mentioned in the Statement herein were single track; that this double track mileage cost a very large sum and contributed very largely to the earnings of the property; that besides this the said defendant had at various points on its lines very extensive costly and valuable terminals, machine shops, such as at Spencer, North Carolina, Knoxville, Tennessee, Atlanta, Georgia, and other points; that none of the railroads mentioned in the Statement herein had in Kentucky valuable property of this character.

Defendant says that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky and of the Constitution of the United States; particularly the Fourteenth Amendment thereof.

And so it is that this defendant says that if the Court should hold that the Southern Railway Company is subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of any or all of the lines of railroad mentioned herein, then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers [fol. 38] of the State of Kentucky, and to attempt to add to that assessment would be in violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof; and the defendant prays that this suit may be dismissed, and for all proper relief.

Wallace & Harris, Humphrey, Crawford & Middleton, Attorneys for Defendant.

IN COUNTY COURT OF WOODFORD COUNTY

ANSWERS TO INTERROGATORIES, SOUTHERN RAILWAY COMPANY

Q. In the Statistics of Railways in the United States compiled by the Interstate Commerce Commission for the year ended June 30,

1913, opposite the name of the "Southern Railway in Kentucky" are these words: "Merged in Southern Railway Company, July 1, 1912." Is that statement true? And if so, what change, if any, has been made since and when?

A. The notation "merged in Southern Railway Company, July 1, 1912" was intended to mean that the operating results of the Southern Railway Company in Kentucky has been consolidated with those of the Southern Railway Company, as, under the rules and regulations of the Interstate Commerce Commission, a separate operating report for the Southern Railway Company in Kentucky was not required.

The method of consolidating these reports had not been changed since that date.

Q. 1. What was the total mileage of railway lines which were operated, owned, leased and controlled by defendant; including [fol. 39] lines controlled by the ownership of a majority of the capital stock?

A.—1914	9,395.82 miles.
1915	9,523.15 "
1916	9,522.79 "

Q. 2. What were the names of the railways which were owned, operated, leased and controlled by defendant? Give the length of each line, including the lines operated in the name of defendant; and those operated in other names but of which defendant owned a majority of the capital stock?

A. See Exhibit A for 1914, A for 1915 and A for 1916.

Q. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railroads?

A.	1914	1915	1916
The A. G. S. R. R. Co.	The A. G. S. R. R. Co.	The A. G. S. R. R. Co.	
Ashville & Craggy Mtn.	Ashville & Craggy Mtn.	Ashville & Craggy Mtn.	
Blue Ridge Ry. Co.	Blue Ridge Ry. Co.	Ashville & Craggy Mtn.	
Cumberland R. R. Co.	Cumberland R. R. Co.	Blue Ridge Ry. Co.	
Danville & Western Ry.	Karo & Tenn. Sou. Ry. Co.	Cumberland R. R. Co.	
Ga. Sou. & Fla. Ry. Co.	Danville & Western Ry. Co.	Danville & Western.	
Hartwell Ry. Co.	Ga. Sou. & Fla. Ry. Co.	Ga. Sou. & Fla.	
Mobile & Ohio R. R. Co.	Hartwell Ry. Co.	Hartwell Ry. Co.	
Northern Ala. Ry. Co.	Mobile & Ohio R. R. Co.		
Tallulah Falls Ry. Co.	Northern Ala. Ry. Co.		
Virginia & South W. Ry. Co.	Tallulah Falls Ry. Co.	Mobile & Ohio.	
Southern Ry. Co.	Virginia & South W. Ry. Co.	Northern Ala. Ry. Co.	
	Southern Ry. Co.	Tallulah Falls Ry.	
		Va. & Sou. West. Ry. Co.	
		Southern Ry. Co.	

Q. 4. a. How much of the mileage disclosed in the answer to question two was within Kentucky?

b. And what lines within Kentucky did defendant control by owning a majority of the capital stock of the corporation in whose name it was operated?

A. a.	1914	1915	1916
	187.07 miles.	187.07 miles.	187.07 miles.
b. Sou. Ry. in Ky.			
Cumberland R. R.			
Cumberland Ry.			
Mobile & Ohio.	Same as 1914.	Same as 1914.	Same as 1914.

Q. 5. Give the name of each County in Kentucky and the number of miles of railroad therein which defendant or the "Southern Railway Company in Kentucky" Mobile & Ohio Railroad Company, Cumberland Railroad, Cumberland Railway operated.

A.—

Mobile & Ohio Railroad:

Fulton County	6.635 miles.
Hickman County	17.052 "
Carlisle County	10.576 "
Ballard County	4.430 "

Total #38.693 miles.

Southern Railway in Kentucky:

Main Lines:

Jefferson County	21.387 miles.
[fol. 41] Shelby County	24.299 "
Anderson County	17.555 "
Mercer County	18.229 "
Boyle County	2.000 "

Total Main Line 83.470 "

Lexington Branch:

Anderson County	3.347 miles.
Woodford County	12.047 "
Fayette County	8.206 "

Total Lexington Branch..... 23.600 "

Georgetown Branch:

Woodford County	9.138 "
Scott County	7.600 "

Total Georgetown Branch..... 16.738 "

Burgin Branch:

Mercer County	3.820	
Total Burgin Branch.....	3.820	"
Grand Total.....	*127.628	miles.

Cumberland Railway:

Bell County	1.74	miles.
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Cumberland Railroad Co.:

Knox County	12.90	miles.
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Q. 6. Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give the [fol. 42] counties in which operations were carried on and the mileage therein.

A. No.

Q. 7. What was the total of the railway operations revenues for each of the roads listed in the answer to question two above?

A. See Exhibits B for 1914, B for 1915 and B for 1916 (two sheet-).

Q. 8. What was the total railway operating expenses for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 9. What was the total railway tax accruals for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 10. What was the total non-operating income for each of said roads?

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two sheets).

Q. 11. What further amounts of money were deducted from income of each of said roads to determine the profit and loss for said year? Give general classification and amount.

A. See Exhibits B for 1914, B for 1915 & B for 1916 (Two sheets).

Q. 12. Explain briefly the nature of each of these deductions, that is explain what the deductions represent or the nature of the expense.

A. See Exhibits B for 1914, B for 1915 & B for 1916 (two Sheets).

[fol. 43] Q. 13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore the defendant.

A. —

Directors

1914	1915	1916
A. B. Anderson. #	Fairfax Harrison. #	W. S. Camp.
Fairfax Harrison. #	C. E. McCarthy.	Fairfax Harrison. #
C. E. A. McCarthy.	E. A. Merrill.	C. E. A. McCarthy.
E. A. Merrill.	H. B. Spencer. #	E. A. Merrill.
H. B. Spencer.	F. S. Wynn.	H. B. Spencer. #
F. S. Wynn.		F. S. Wynn.

*Does not include lines operated under trackage rights.

‡Also Directors Southern Railway Co.

Officers

1914	1915	1916
Pres., Fairfax Harrison.	Fairfax Harrison....	Fairfax Harrison.
V. P., A. B. Anderson..	J. M. Culp.....	J. M. Culp.
" J. M. Culp.....	T. C. Powell.....	T. C. Powell.
" T. C. Powell....	H. B. Spencer.....	H. B. Spencer.
" H. B. Spencer...	H. W. Miller.....	H. W. Miller.
Sec., F. S. Wynn.....	F. S. Wynn.....	F. S. Wynn.
Treas., H. C. Ansley...	H. C. Ansley.....	H. C. Ansley.
Gen. Counsel at N. Y., F. L. Stetson.....	F. L. Stetson.....	F. L. Stetson.
Gen. Counsel at Louis- ville, Ky., A. P. Humphry	H. P. Humphry.....	H. P. Humphry.
Comp., A. H. Plant....	A. H. Plant.....	A. H. Plant.
V. P. & G. M., E. H. Coapman	E. H. Coapman.....	E. H. Coapman.

Officers held similar office with Southern Railway Company.

[fol. 44] Q. 14. Name the officers and directors of the Moblie & Ohio and state what relation, if any, each of them bore to defendant.

A. —

Directors

1914	1915	1916
Albert P. Bush.	Albert P. Bush.	Albert P. Bush.
Guy Cary.	Guy Cary.	Guy Cary.
Henry Hall.	Henry Hall.	Johnston Deforest.
Fairfax Harrison. #	Fairfax Harrison. #	Henry Hall.
Adrian Iselin, Jr. #	Adrian Iselin, Jr. #	Fairfax Harrison. #
Ernest Iselin.	Ernest Iselin.	Adrian Iselin, Jr. #
W. Emlen Roosevelt.	W. Emlen Roosevelt.	Ernest Iselin.
C. Sidney Shepard.	C. Sidney Shepard.	W. Emlen Roosevelt.
H. B. Spencer.	H. B. Spencer. #	C. Sidney Shepard.
H. N. Street.	A. H. Stevens.	H. B. Spencer. #
A. H. Stevens.	H. M. Street.	H. M. Street.
R. V. Taylor.	R. V. Taylor.	R. V. Taylor.
Samuel Woolverton.	Samuel Woolverton.	Samuel Wolverton.

#Also Directors Southern Railway Co.

Officers of Mobile & Ohio

1914	1915	1916
Pres., Fairfax Harrison#	Fairfax Harrison#	Fairfax Harrison.#
1st V. P., A. B. Andrews#		
V. P. & G. M., R. V. Taylor	R. V. Taylor	R. V. Taylor.
Secy., A. W. McIntosh.	F. S. Wynn#	F. S. Wynn.#
Treas., H. C. Ansley#	H. C. Ansley#	H. C. Ansley.#
Asst. Treas. & Asst. Secy, Geo. A. Cooke.	Geo. A. Cooke.	Geo. A. Cooke.
[fol. 45]		
Comp., C. B. Hays.	C. B. Hays.	C. B. Hays.
Gen. Counsel, S. R. Prince.	S. R. Prince.	S. R. Prince.
Gen. Supt., E. C. Randell.	E. C. Randell.	E. C. Randell.
Frt. & Trf. Mgr., Haiden Miller	Haiden Miller	Haiden Miller.
Gen. Frt. Agt., J. M. Denyven.	J. M. Denyven.	J. M. Denyven.
Gen. Pass. Agt., C. Rudolph	C. Rudolph	C. Rudolph.

Q. 15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant,

A. —

Directors

1914	1915	1916
R. W. Stone.	A. J. Hazeltine.	A. J. Hazeltine.
L. R. Freeman.	L. R. Freeman.	L. R. Freeman.
W. M. Lindsey.	C. B. Ayers.	C. B. Ayers.
A. J. Hazeltine.	G. H. Dunham.	G. H. Dunham.
C. B. Ayers.	R. W. Stone.	R. W. Stone.
G. H. Dunham.		J. L. Stone.
F. F. Whittekin.	F. F. Whittekin.	F. F. Whittekin.

Officers

1914	1915	1916
Pres., R. W. Stone.	R. W. Stone.	R. W. Stone.
V. Pres., C. B. Ayers.	C. B. Ayers.	C. B. Ayers.
Sec'y, J. L. Stone.	J. L. Stone.	J. L. Stone.
Treas., A. J. Hazeltine.	A. J. Hazeltine	A. J. Hazeltine.
Auditor, W. B. Starke.	W. B. Starke	A. C. Matheson.
Gen. Mgr., T. H. Hayden.	T. H. Hayden.	T. H. Hayden.

*Held similar office with Southern Railway Company.

Gen. Frt. Agent,

W. B. Starke.....W. B. StarkeA. C. Matheson.

[fol. 46]

Gen. Pass. Agent,

W. B. Starke.....W. B. StarkeA. C. Matheson.

Chief Rngr., _____T. H. Haydon.

Gen. Coun., Jas. D. Black...Jas. D. Black.....

Officers and directors not connected with Southern Railway Company.

Q. 16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant.

A. —

Directors

1914	1915	1916
D. A. Carpenter.	D. A. Carpenter.	D. A. Carpenter.
W. P. Chamberlain.	W. P. Chamberlain.	W. P. Chamberlain.
Henry Donde.	Fairfax Harrison.*	Fairfax Harrison.
S. R. Luttrell.	S. R. Luttrell.	S. R. Luttrell.
G. W. Montgomery.	G. W. Montgomery.	G. W. Montgomery.

Officers

1914	1915	1916
Pres., Henry Fonde#	Fairfax Harrison#	Fairfax Harrison.#
V. Pres., H. B. Spencer#	H. B. Spencer#	H. B. Spencer.#
Sec'y, F. S. Wynn#	F. S. Wynn#	F. S. Wynn.#
Treas., H. C. Ansley#	H. C. Ansley#	H. C. Ansley.#
Gen. Coun.,		
A. P. Humphrey#	A. P. Humphrey#	A. P. Humphrey.#
Compt., A. H. Plant#	A. H. Plant#	A. H. Plant.#
Gen. Mgr.,		
E. H. Coapman#	E. H. Coapman#	E. H. Coapman.#

[fol. 47]

EXHIBIT A FOR 1914

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Ry. Co. Year
Ended June 30, 1914

Owned:

Southern Railway Company 4,104.20

*Also director of Southern Railway Co.

•Officers held similar office with Southern Railway Company.

Leased:

Southern Railway—Carolina Division.....	758.03
Elberton Southern Railway.....	50.60
Mobile & Birmingham.....	150.35
Richmond & Mecklenburgh Railroad.....	31.30
Georgia Midland Railway.....	97.88
North Carolina Railroad.....	224.34
Atlanta & Charlotte Air Line Ry.....	263.08
Atlantic & Danville Railway.....	267.69
North & South Carolina Railroad.....	4.45
Lockhart Railroad.....	13.81
The Whitney Company.....	6.20
Wooldridge Jellico Coal Co.....	1.75
	<hr/> 1,869.48

Operated under Agreement:

Southern Railway Company in Mississippi.....	11.40
Trackage Rights.....	484.70

Controlled by Ownership of Stock:

State University Railroad.....	10.20
North Carolina Midland Railroad.....	53.52
High Point, Randleman, Asheboro & Sou.....	26.80
Yadkin Railroad.....	41.00
[fol. 48] Sievern & Knoxville Railroad.....	17.44
Atlantic & Yadkin Railway.....	161.08
Ensley Southern Railway.....	33.42
Roswell Railroad.....	12.55
Cumberland Railway.....	11.21
Carolina & Tennessee Southern Railway.....	13.90
Tennessee & Carolina Southern Railway.....	25.30
Southern Railway in Kentucky.....	127.75
The Alabama Great Southern Railroad Co.....	309.41
Ashville & Craggy Mountain Railway Co.....	4.44
Blue Ridge Railway Company.....	44.00
Cumberland Railroad Company.....	12.90
Danville & Western Ry. Co.....	83.00
Georgi- Southern & Florida Railway Co.....	395.00
Hartwell Railway Company.....	10.10
Mobile & Ohio Railroad.....	1,122.48
Northern Alabama Railway Co.....	112.50
Tallulah Falls Railway Co.....	58.00
Virginia & Southwestern Ry. Co.....	240.14
	<hr/> 2,926.14
Total.....	<hr/> 9,395.82

Exhibit B, 1914, is in words and figures as follows, to-wit:

WOODFORD CIRCUIT COURT
COMMONWEALTH OF KENTUCKY
v.
SOUTHERN RAILWAY Co.,
COMMONWEALTH OF KENTUCKY
v.
SOUTHERN RAILWAY Co.,
and WALKER D. HINES

It is agreed by counsel for the parties in the above-named causes [fol. 49] that the following original exhibits shall not be copied by the Clerk, but that said exhibits shall be taken from the record in the Woodford Circuit Court and attached to the copy of the record for the Court of Appeals, and when so attached they shall have the same effect as if the Clerk had made copies thereof in the record. The exhibits referred to are the exhibits headed "Income Account year 1914, Income Account year 1915, and Income Account Year 1916," all marked Exhibit B, and which are filed with the answer of the defendant in the first-named cause; also Income Account June 30, 1917, and Federal Income Account, December 31, 1918, both marked Exhibit B, filed with the answer of the defendant in the last-named cause.

The Clerk will copy this stipulation with the record for the Court of Appeals.

Leslie W. Morris, Hobson & Hobson, for Plaintiff. Wallace & Harriss, Humphrey, Crawford & Meddleton, for Defendants.

Said stipulation is endorsed "filed Aug. 10, 1921. Attest: C. A. Witt, Clerk.

EXHIBIT A FOR 1915

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Ry. Co. Year
Ended June 30, 1915

Owned:

Southern Railway Company..... 4,226.29

Leased:

Southern Railway—Carolina Division.....	757.83
Elberton Southern Railway.....	50.60
Mobile & Birmingham Railroad.....	150.35
[fol. 50] Richmond & Mecklenburgh.....	31.30
Georgia Midland Ry.....	97.88
North Carolina Railroad.....	220.77
Atlanta & Charlotte Air Line Ry.....	263.08
Atlantic & Danville Rwy.....	267.69
North & South Carolina R. R.....	3.73
Lockhart Railroad.....	13.81
The Whitney Co.....	6.20
Woolridge-Jellico Coal Co.....	1.15
	<hr/> 1,861.99

Operated under Agreement:

Southern Railway Company in Mississippi.....	11.40
Trackage Rights.....	491.64

Controlled by Ownership of Stock:

State University Railroad.....	10.20
North Carolina Midland Railroad.....	53.52
High Point, Randelman, Asheboro & Southern.....	27.59
Yadkin Railroad.....	41.00
Sievern & Knoxville Railroad.....	17.44
Atlantic & Yadkin Railway.....	163.10
Ensley Southern Railway.....	33.42
Roswell Railroad.....	12.55
Cumberland Railway.....	11.21
Tennessee & Carolina Southern Ry.....	25.30
Southern Railway in Kentucky.....	127.63
Alabama Great Southern Railroad Co.....	309.41
Ashville & Craggy Mount. in Railway Co.....	4.44
Blue Ridge Railway Co.....	44.00
Cumberland Railroad Co.....	12.90
Carolina & Tennessee Southern Railway Co.....	13.90
Danville & Western Railway Co.....	83.00
[fol. 51] Georgia Southern & Florida Ry. Co.....	395.00
Hartwell Railway Co.....	10.10
Mobile & Ohio Railroad Co.....	1,122.48
Northern Alabama Railway Co.....	122.50
Tallulah Falls Railway Co.....	58.00
Virginia & Southwestern Ry. Co.....	240.14
	<hr/> 2,928.83
Total	<hr/> 9,523.15

Exhibit "B" for 1915 is in words and figures as follows, to-wit:

EXHIBIT A FOR 1916

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Ry. Co. Year
Ended June 30, 1916

Owned:

Southern Railway Company.....	4,212.64
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Leased:

Southern Railway—Carolina Division.....	757.72
Elberton Southern Railway.....	50.60
Mobile & Birmingham Railroad.....	150.35
Richmond & Mecklenburgh Railroad.....	31.30
Georgia Midland Railway.....	97.88
Memphis-Chattanooga Railway.....	2.83
North Carolina Midland Railroad.....	53.52
North Carolina Railroad.....	225.95
Atlanta & Charlotte Air Line Railway.....	263.08
Atlantic & Danville Railway.....	277.71
North & South Carolina Railroad.....	3.73
Lockhart Railroad.....	13.81
[fol. 52] Talla-ssee Power Company.....	11.23
Woolridge-Jellico Coal Co.....	1.75
	<hr/> 1,941.46

Operated under Agreement:

Southern Railway Co. in Mississippi.....	11.40
Trackage Rights.....	495.42

Controlled by Ownership of Stock:

State University Railroad.....	10.20
High Point, Ranelman, Asheboro & Southern..	27.98
Yadkin Railroad.....	41.00
Sievern & Knoxville Railroad.....	17.44
Atlantic & Yadkin Railway.....	163.10
Ensley Southern Railway.....	33.42
Roswell Railroad.....	12.55
Cumberland Railway.....	11.21
Tennessee & Carolina Southern Railway.....	29.89
Southern Railway In Kentucky.....	127.64
Alabama Great Southern Railroad Co.....	312.41
Ashville & Craggy Mt. Ry. Co.....	4.44
Blue Ridge Railway Co.....	44.00
Cumberland Railroad Co.....	12.90
Danville & Western Ry. Co.....	83.00
Georgia Southern & Florida Ry. Co.....	402.47
Hartwell Railway Co.....	10.10

Mobile & Ohio Railroad Co.....	1,122.48
Northern Alabama Railway Co.....	112.50
Tallulah Falls Railway Co.....	58.00
Virginia & Southwestern Ry. Co.....	225.14
	<hr/> 2,861.87
Total	<hr/> 9,522.79

Exhibit "B" for 1916 is in words and figures as follows, to-wit:

[fol. 53] In answer to the 17th Interrogatory the following are the facts:

Prior to and since the 1st of January, 1917, a corporation called the Southwestern Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwestern Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of the shares of stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and the Alabama Great Southern Railroad Company in the stock of the Southwestern Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Company and the Alabama Great Southern Railroad Company has been more than half of said stock.

The Item "Hire of Equipment" is the balance due by the Southern Railroad Company to other railroads on account of the use of the equipment of such other railroads, less any balance due to the Southern Railroad Company for the use of its equipment by other railroads.

"Joint Facility Rents" are the amounts due by the Southern Railway Company to other railroads or terminal companies on account of the use of such property as terminal facilities, owned by such other railroads or terminal companies, less any amounts due to the Southern Railway Company for the use of its terminal facilities or other similar property, by other railroads or terminal companies.

[fol. 54] In ascertaining the net income of railroads, which income is capitalized in order to ascertain the values of the capital stock of said railroads, it is and has been, during the years in controversy herein, the fixed rule of the assessing authorities of Kentucky to deduct taxes, hire of equipment in debit and joint-facility rents in debit.

Sworn to by Alex. P. Humphrey; jurat omitted in printing.

[fol. 55] [File endorsement omitted.]

[fol. 56] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

REPLY—Filed June 28, 1920

Comes the Commonwealth of Kentucky by Robert Hawkins, Sheriff of Woodford County and for its Reply to paragraphs one, two and three of the Answer of defendant says that the net earnings or income of defendant, according to the statute so made and provided, must include and do necessarily include the net earnings or income of each of the railroads controlled by it. Plaintiff says that the miles of line produce said income and that when said miles of line form a part of the defendant's total system, then the net earnings or income of each of said component parts must be added together to determine the net earnings or income of defendant. Plaintiff therefore denies that the net earnings or income of defendant for the year ending June 30, 1914, was \$16,217,957.73 and avers same was \$29,093,759.00 as alleged in its statement herein:

Plaintiff further denies that the net earnings or income of defendant for the year ending June 30, 1915, was \$13,110,019.89 and avers same was \$25,817,397.00 as alleged in its statement herein: [fol. 57] Plaintiff further denies that the net earnings or income of defendant for the year ending June 30, 1916, was \$21,047,540.00 and avers same was \$36,099,617.00 as alleged in its statement.

For Reply to Paragraph 4 of defendant's Answer plaintiff says that said Board of Valuation and Assessment may have deducted taxes in fixing the net earnings or income of railroads for each of the said three years. Plaintiff says that the action of said Board in deducting taxes to determine net earnings or income was based on an error of law, in that no natural person is or ever was allowed any deduction for taxes paid in computing the value of intangible property: and it is further provided by the Constitution of this Commonwealth that all corporate property, shall pay the same rate of taxation paid by individual property. The action of said Board in deducting taxes paid by corporations results in corporate property paying at a less rate than paid by individual property.

Plaintiff denies that for each or any of the taxing years mentioned in the statement, local or any assessors or assessor, or other or any assessing officers or officer of the State of Kentucky have either habitually, or intentionally or systematically or generally assessed the property of individuals or individual, or corporations or corporation within their sphere of duty at 52 per cent or any other per cent less than 60 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale. Denies that for any years or any year said alleged assessment has been a matter of public or any notoriety in the State. Plaintiff admits that said Board equalized at sixty per cent to conform with the ruling of the Supreme [fol. 58] Court of the United States, Plaintiff denies that it would

be a violation of the Constitution of Kentucky or the United States to make an assessment on a basis of sixty per cent.

And for further Reply to Paragraph 5 of defendant's Answer, plaintiff denies that in none of said periods did defendant have any tangible property in this State, denies that defendant had no tangible property in this State during said periods or any of them. Plaintiff denies that the four lines of railroads within Kentucky or any of them as set out in its statement herein have been assessed against defendant. An assessment has been made of said four lines, but made on reports which did not state the true facts and did not show the defendant's property in Kentucky. Plaintiff admits that defendant had a double track and certain terminals outside of Kentucky and avers that on account thereof defendant may be entitled to further equalization of five per cent and not exceeding that, making an admitted equalization of 60% less 5% or 55%. Plaintiff denies this action is an effort to bring into Kentucky for the purpose of taxation, property not in Kentucky or value or values appertaining to property not in Kentucky or earnings derived from property not in Kentucky; denies this action is in violation of the Constitution of Kentucky or the United States; denies that a judgment for plaintiff herein is in violation of the Constitution of Kentucky or the United States.

Wherefore plaintiff prays as in its statement.

W. D. Jesse, Leslie W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson.

[File endorsement omitted.]

[fol. 59]

[Title omitted]

JUDGMENT—September 23, 1920

Came the parties and files Stipulations and by consent these two cases are heard together and the cases being submitted to the Court and the Court being advised it is adjudged by the Court that the Plaintiff's petitions be dismissed and that plaintiff take nothing thereby to all of which plaintiff *expected* and prayed an Appeal which is granted.

Said Judgment is endorsed as follows, to-wit: Entered in Order book No. 4, page 594.

[fol. 60] IN CIRCUIT COURT OF WOODFORD COUNTY
COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,
and

COMMONWEALTH OF KENTUCKY, Plaintiff,

[fol. 61]

vs.

SOUTHERN RAILWAY COMPANY, etc., Defendants

JUDGMENT AND APPEAL ORDER—March 12, 1921

This day came the parties to the above proceedings, and filed stipulations in each case, and by consent these two cases are heard together; and said cases being submitted to the Court on the pleadings, exhibits and stipulations now filed, and the Court being advised, it is adjudged by the Court that the plaintiff's petitions be dismissed in each of said cases, and that plaintiff take nothing in either, to all of which, and as applying to each case, the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted.

The printed reports to be stockholders and the reports to the Auditor, filed in the record, are not to be copied in the transcript, but will be filed with the transcript with the Clerk of the Court of Appeals; and the stipulations used in the County Court and not in the Circuit Court are not to be copied in the transcript.

The defendants, in each of said causes shall recover of R. S. Hawkins, as Sheriff of Woodford County, their costs in said causes expended.

Approved. J. P. Hobson, for Plff.; Chas. M. Harriss for Deft.

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Plaintiff,

vs.

[fol. 62] SOUTHERN RAILWAY COMPANY, Defendant

STIPULATION OF FACTS—Filed March 12, 1921

The parties hereto, by their respective Counsel, hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court.

1. The Southern Railway Company of Virginia owns to the extent and set out in the answer to the petition and the answers to the Interrogatories herein the stock of the following four railroads, which do own property and operate in Kentucky, viz.:

Southern Railway Company in Kentucky,
Cumberland Railroad Company,
Cumberland Railway Company,
Mobile & Ohio Railroad Company.

2. When the Southern Railway Company in Kentucky acquired the property of the Louisville Southern Railway Company in 1894, it also acquired the following equipment, viz.:

Steam Locomotives	25
Box Cars	609
Flat Cars	47
Stock Cars	70
Caboose Cars	12
All classes of Freight cars	738
Coaches	15
Combination Passengers Cars	3
Baggage and Express Cars	5
All classes of Passenger Cars	23
Derrick Cars	1
Other Company Service Cars	8
All classes of Cars in service	769

Since that time the above named equipment has been used by [fol. 63] Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway Company in Kentucky, and portions by the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment was used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia was without charge to that Company, in consideration of the Company's furnishing to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway Company in Kentucky.

When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway Company of Kentucky; so that, for every period of time from 1894 up to and including the present time, the Southern Railway Company in Kentucky owns the same number of locomotives, freight and passenger cars, etc., that it did in 1894, and has reported each year and tax-paid each year on the same description and value of equipment as on hand September 1, 1894. The Southern Railway Company in Kentucky has bought no equipment since 1894.

3. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in Stipulation 2, it has

leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of various other railroad companies, and has done this under the usual traffic arrangements obtaining among railroads, and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia, and other railroads, the regular charges for hire of equipment.

[fol. 64] 4. No railroad operates entirely with its own rolling stock; that all such rolling stock equipment is more or less common use among the different railroads, and for such use such railroad pays to the owning railroad the regular standard prices.

5. Except for the ownership of stock of the four railroads specified in Stipulation 1, and except for the equipment detailed in Stipulation 3, the Southern Railway Company of Virginia owns otherwise no property or leases of any kind in the State of Kentucky, and transacts no business in the State of Kentucky, except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, it owns or operates said lines of railroad or any of them within the meaning of the Kentucky Statutes and this question is submitted to the Court on all the facts.

6. The printed pamphlets filed June 28, 1920, marked "Annual Report of the Southern Railway Company" for the years in question are the reports of the stockholders made and printed by the corporation and are correct copies of said reports. Plaintiff read on the trial from said Report for 1914, pages 17, 69, 67; for 1915, pages 15, 63, 69; for 1916, pages 55, 56; for 1917, pages 51, 53; for 1918, pages 19, 21 and no other pages were read on the trial.

7. The Southern Railway Company in Kentucky was incorporated under the laws of the State of Kentucky on August 17, 1894. A copy of the articles of incorporation hereto attached, is a true and correct copy of such articles of incorporation.

The lines of railroad owned and operated by the Southern Railway Company in Kentucky extends from Louisville, Kentucky, in an easterly direction to Danville, Kentucky, passing through Shelbyville, Lawrenceburg and Harrodsburg, Kentucky. There are [fol. 65] branch lines extending from Harrodsburg to Burgin, Kentucky; from Lawrenceburg to Lexington, Kentucky, and from Versailles to Georgetown, Kentucky.

At Danville, Burgin, Lexington and Georgetown, the lines of the Southern Railway Company in Kentucky connect with the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company's road from Cincinnati, Ohio, to Chattanooga, Tennessee. At each of such points all of the terminal facilities used by the Southern Railway Company in Kentucky are the property of the Cincinnati, New Orleans & Texas Railway Company.

At Louisville, Kentucky, the passenger depot belonging to the Illinois Central Railroad Company is used.

At Louisville, Kentucky, the Southern Railway Company in Ken-

tucky uses the passenger depot belonging to the Illinois Central Railroad Company, and the shops, round-houses and freight yards belonging to the Kentucky & Indiana Terminal Railroad Company. The only terminal facility owned in Louisville by the Southern Railway Company in Kentucky is its freight house.

The Southern Railway Company in Kentucky owns no double-track lines and the only terminal facilities owned by it are inexpensive ones situated in the small towns along the route.

What is now the Southern Railway Company in Kentucky was originally chartered by the State of Kentucky in 1868 under the name of the "Louisville, Harrodsburg and Virginian Railroad Company" (Acts 1867-1868, Vol. 2 page 553). In 1884, the charter was amended and the name changed to that of "Louisville Southern Railroad Company" (Acts 1883-1884, Vol. 2, p. 665). The City of Louisville subscribed \$100,000 of bonds to aid in the construction [fol. 66] of the road (Woolley v. Louisville Southern, 93 Ky. 223, 19 S. W. 595).

In 1888, a line had been built from Louisville, Kentucky to Burgin, Kentucky.

On December 10, 1888, the Louisville Southern Railroad Company leased all of its property to the Monon Railroad. After this lease, a branch line was constructed from Lawrenceburgh, Kentucky, to Lexington, Kentucky.

In 1884, there was chartered by the Legislature the "Versailles & Midway Railroad Company" (Acts 1883-1884, Vol. 2, p. 9), and in 1885, the line from Versailles to Midway, Kentucky, was constructed by that Company.

In 1889, the Louisville Southern Railway Company acquired the stock of the Versailles & Midway Company and the line from Midway, Kentucky to Georgetown, Kentucky was completed and the three roads were consolidated.

In 1890, the Louisville Southern Railroad Company leased all of its property to the East Tennessee, Virginia & Georgia Railway Company and on July 1, 1893, default having been made in payment of interest on bonds, the property of the Louisville Southern Railroad Company was foreclosed in the Circuit Court of the United States for the District of Kentucky, and the property sold on August 16, 1894, to Charles H. Coster. Thereafter on August 17, 1894, there was incorporated the Southern Railway Company in Kentucky to take over the lines, franchises, etc., of the Louisville Southern Railroad Company, and that corporation has since continued to own and operated what was formerly the Louisville Southern Railroad Company.

The Southern Railway Company of Virginia was incorporated [fol. 67] February 20, 1894. Neither it nor its predecessors had any stock in or control of any of the predecessors of the Southern Railway Company in Kentucky.

8. The Cumberland Railroad Company was incorporated under the laws of the State of Kentucky on ———, ———. It owns and operates a line of railroad beginning at Artemus, Kentucky, on the line of

the Louisville & Nashville Railroad Company and running in a southeasterly direction 12.9 miles, all in Knox County, Kentucky. It connects with no other railroad except the Louisville & Nashville Railroad Company at Artemus, Kentucky.

9. The Cumberland Railway Company was incorporated under the laws of the State of Tennessee, and owns and operates a line of railroad 1.74 miles long in Bell County, Kentucky, and extending from a point in Bell County, Kentucky, to tracks of the line of railroad owned and operated jointly by the Louisville & Nashville Railroad Company and the Southern Railway Company outside of the State of Kentucky.

10. The Mobile & Ohio Railroad Company was chartered by the States of Alabama, Mississippi and Tennessee in 1848 (Acts of Alabama, 1848, p. 225; Laws of Mississippi, 1848: Acts of Tennessee, 1847-1848, p. 177), and in 1848, the State of Kentucky passed an act "to authorize the Mobile & Ohio Railroad Company to extend their railroad from the southern bound-ry of the State of Kentucky to the Mississippi or Ohio Rivers" (Acts of Kentucky, 1847-1848, p. 344). The States of Alabama and Mississippi (1850 and 1852) gave to the Mobile & Ohio Railroad Company a total of 1,156,658.92 acres of land for the purpose of assisting in the financing of [fol. 68] that road. On June 30, 1901, the Mobile & Ohio Railroad Company still held 303,102.22 acres of this land. The construction of this road was commenced in March 1852, and completed in December, 1857.

In January, 1901, the Southern Railway Company of Virginia offered to exchange its own securities for enough of the stock and securities of the Mobile & Ohio Railroad Company to give it a majority holding in that Company. By April, 1901, a majority of the stock and securities of the Mobile & Ohio Railroad Company was thus secured and has been held since by the Southern Railway Company of Virginia.

The road of the Mobile & Ohio Railroad Company extends from St. Louis, Missouri, to Mobile Alabama. It only passes through one corner of the State of Kentucky, and touches no larger cities in the State of Kentucky. Its total mileage in the State of Kentucky during the years involved was only 38.63 miles.

11. There are no doubt tracks or extensive or expensive terminals or shops in Kentucky belonging to either the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company or the Mobile & Ohio Railroad Company.

12. The Southern Railway Company of Virginia owned terminals, shops and double tracks outside of the State of Kentucky of the value of:

1914:

Double track.....	\$32,150,853.37
Terminals, etc.....	36,855,505.92

Totals	\$69,006,359.29
--------------	-----------------

1915:

Double track.....	\$34,729,197.06
Terminals, etc.....	42,036,197.69

Total	\$76,765,394.75
-------------	-----------------

[fol. 69] 1916:

Double track.....	\$39,443,155.15
Terminals	47,429,637.77

Total	\$86,872,792.92
-------------	-----------------

13. The Alabama Great Southern Railway Company owned during the years in controversy terminals of the value of \$45,478.12, double tracks,

1914	\$183,749.71
1915	943,226.20
1916	1,170,496.52

14. The net income of the Southern Railway Company of Virginia, including that of the railroads owned, operated, leased or controlled by it for the years in controversy was;

1914	\$19,066,908.92
1915	15,880,419.63
1916	25,519,430.81

The above figures do not include sums paid for taxes which were as follows:

1914	3,557,879.74
1915	3,418,192.26
1916	3,807,328.92

If the Court is of opinion that the taxes are not deductible in ascertaining net income, the above sums are to be added.

15. The four railroads operating in Kentucky had a combined mileage during the years in controversy as follows:

[fol. 70] 1914:

The Southern Railway Company in Kentucky.....	127.628
Mobile & Ohio Railroad Company.....	38.693
Cumberland Railroad Company.....	12.90
Cumberland Railway Company.....	1.74

180.961

Trackage rights over other railroads.....	31.20
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Total Mileage.....	212.16
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1915:

Southern Railway Company in Kentucky.....	127.628
Mobile & Ohio Railroad Company.....	38.693
Cumberland Railroad Company.....	12.90
Cumberland Railway Company.....	1.74
	<hr/>
	180.961
Trackage rights over other railroads.....	35.519
	<hr/>
Total Mileage.....	216.48

1916:

Southern Railway Company in Kentucky.....	127.628
Mobile & Ohio Railroad Company.....	38.693
Cumberland Railroad Company.....	12.90
Cumberland Railway Company.....	1.74
	<hr/>
	180.961
Trackage rights over other railroads.....	38.919
	<hr/>
Total mileage.....	219.88

16. The Southern Railway Company of Virginia, during the years involved, owned, operated, leased and controlled the following mileage:

1914.....	9,395.82 miles
1915.....	9,523.15 miles
1916.....	9,522.79 miles

17. During each of the years involved, the Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland [fol. 71] land Railway Company and the Mobile & Ohio Railroad Company, by their respective officers, or during Federal control by the officers of the Director General, filed with the State Railroad Commission, State Board of Valuation and Assessment, and the Tax Commissioner of Kentucky, full reports showing the results of all of the operations, etc., of the respective road as required by Statutes, and each Company paid the full tax assessed on its tangible and intangible property.

18. For the years, 1914, 1915 and 1916, the property of all railroads in the State of Kentucky was equalized at sixty per cent of its value.

19. In its report to the Kentucky Railroad Commission for each of the years in question, the following question and answer thereto appears in the reports made by the Southern Railway Company in Kentucky:

"2. Did any corporation or corporations, transportation or other, hold control over the respondent at the close of the year?

"Ans. This Company is advised that Southern Railway Company controls this Company through the ownership of its entire capital stock."

Substantially the same answers were made by the Cumberland Railway Company and Cumberland Railroad Company. The Mobile & Ohio Railroad Company reported substantially the same, except that the control was affected by the ownership of a large majority of its capital stock.

20 The incorporators of the Southern Railway Company in Kentucky were:

[fol. 72] Samuel Spencer,
Charles H. Coster,
Alexander B. Andrews,
Francis Lynde Stetson,
William A. C. Ewen,
William H. Baldwin, Jr.

Samuel Spencer was the President of the defendant, The Southern Railway Company. The money paid for the property was furnished by the defendant and it caused the organization of the corporation.

21. At all the stations of the Southern Railway Company in Kentucky the bulletin boards have at the head of them in large capital letters these words "Southern Railway System." The same sign is on the windows of the office building in Louisville and over the door are these words: "Southern Railway Company in Kentucky, Incorporated." The Treasurer's office of the Southern Railway Company in Kentucky is kept in Washington in the same building and by the same men as the Southern Railway Company in Virginia.

22. For each of the years involved, the amount paid by all of the railroads in the State of Kentucky for taxes was deducted by the Board of Valuations and Assessment or Tax Commissioner from the income of such railroads before the said income was capitalized for the purpose of arriving at the franchise tax.

W. D. Jesse, Hazelrigg & Hazelrigg, Hobson & Hobson, L.
W. Morris, Attorneys for Plaintiff. Humphrey, Crawford & Hulette, Wallace & Harriss, Attorneys for Defendant.

Southern Railway Company in Kentucky

Articles of Incorporation, Dated August 17, 1894

Southern Railway Company in Kentucky, Articles of Incorporation,
August 17, 1894

We, the undersigned, to-wit: Charles H. Coster, a purchasing committee, hereinafter called the Purchaser, who did purchase the railroad and other property of the Louisville Southern Railroad Company at a sale thereof held in the City of Louisville Kentucky, on the 16th day of August, 1894, under a decree of foreclosure and sale entered on the 11th day of June, 1894, and amended June 21, 1894, in a certain suit in equity pending in the Circuit Court of the United States of America for the District of Kentucky, wherein the Central Trust Company of New York and others were complainants and the Louisville Southern Railroad Company, a corporation created by and existing under the laws of the State of Kentucky, was defendant, in which suit it was sought to foreclose the mortgage dated the 1st day of July, in the year 1890, and upon or about that day duly executed, acknowledged and delivered by the said Louisville Southern Railroad Company to said Central Trust Company of New York, and in which suit it was undertaken to sell the whole of the mortgaged property and premises, being the rights, property, [fol. 74] privileges and franchises of the said Louisville Southern Railroad Company, and the said purchasing Committee having at the time of said purchase declared, and the said Court having subsequently ordered and decreed, that the said sale should be for the benefit of a corporation thereafter to be formed under the laws of Kentucky by the name of the "Southern Railway Company in Kentucky," and the said purchasing committee having paid for the said railroad property sold under the said judgment decree the sum of one million dollars (\$1,000,000), of which twenty thousand dollars (\$20,000) was paid in cash to the Special Master making the sale, and the remainder thereof, to-wit nine hundred and eighty thousand dollars (\$980,000) has been paid by delivering to the Special Master, for proper endorsement thereon of partial payment, bonds of the Louisville Southern Railway Company secured by said mortgage, to the amount of four million two hundred ninety-nine thousand five hundred dollars (\$4,290,500) and the said Court having ordered and decreed the Special Master, Edmund T. Halsey, as further evidence of such sale and purchase, to execute and deliver a deed and conveyance to the said Southern Railway Company in Kentucky, accepted as purchaser in said proceedings, of all the railroad property described in said judgment decree, to-wit:

All and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or mixed, embraced or included

[fol. 75] in said decree of sale and the sale pursuant thereto, that is to say:

All and singular the railroad of the said Louisville Southern Railroad Company, beginning at a point on Magnolia Avenue, between Eleventh and Twelfth streets, in the City of Louisville, and extending thence through the Counties of Jefferson, Shelby, Anderson, and Mercer, via Shelbyville, Lawrenceburg, and Harrodsburg, to Burgin, in Mercer County, on the Cincinnati Southern Railroad, and extending from Lawrenceburg through Versailles in Woodford County to Lexington in Fayette County, and also to Georgetown in Scott County, including all rights of way, roadbed, rails, bridges, railroad tracks, switches, side tracks, turntables, lands, depots, station houses, round houses, machine shops, buildings and structures of every sort, with all other things which are part of, connected with or appurtenant to said railroad as above described and all locomotives, engines, tenders, cars, carriages, tools, machinery, rolling stock and equipment; also, the full benefit of certain contracts between the Louisville Southern Railroad Company and the Kentucky and Indiana Bridge Company, and the Newport News and Mississippi Valley Railroad Company mentioned in said decree, together with all rights and privileges existing thereunder for and during the full term thereof; also certain depot grounds and buildings at Thirteenth and High streets, and the eight-acre tract adjoining the Kentucky and Indiana Bridge Company's yards described in said decree; also, all property, franchises, rights, powers, privileges and immunities belonging or appurtenant to said Louisville Southern Railroad Company, and all tools, incomes, issues and profits arising out of or to be derived from the above-described mortgaged premises, and all the right, title, interest and estate, either legal or equitable, of the Louisville Southern Railroad Company in and to said mortgaged premises, excepting, however, any extension of [fol. 76] said railroad beyond either of the terminal points herein mentioned, to-wit, Louisville, Burgin, Lexington, and Georgetown, and any branch or branches constructed from said railroad, as the same existed at the date of the mortgage mentioned in said decree, to-wit, July 1, 1890, and all rolling stock or equipment expressly purchased by reason and for the use of such extension or of such branch or branches.

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 11th of June, 1894, to which reference is hereby made.

Together with all the corporate rights, privileges, immunities and franchises of said Louisville Southern Railroad Company, and all the tools, fares, freights, rents, incomes, issues and profits of said railroad, and all interest and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold at any time owned or acquired by and now in possession of, said Louisville Southern Rail-

road Company, or Samuel Spencer and Henry Fink, or either of them as receivers thereof.

And we whose names are also hereto subscribed, to-wit, Samuel Spencer, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., here-[fol. 77] inafter called Associates, whom such purchaser has associated with him in this organization of a new corporation pursuant to the laws of Kentucky,

Do hereby join in executing these Articles of Incorporation, and do hereby certify, specify, and declare that we have associated to form a corporation for the purpose of purchasing, owning, constructing, operating and maintaining the railroad hereinbefore described; and we do further certify:

First. The name of the corporation shall be the Southern Railway Company in Kentucky.

Second. The name of the city and county in which its principal office or place of business is to be located is the City of Louisville, in the County of Jefferson.

Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on is that of owning, operating and maintaining the railroad above described, with such extensions and branches thereof as may from time to time be constructed or acquired in accordance with law.

Fourth. The amount of capital stock is one million dollars (\$1,000,000) and the number of shares into which the same shall be divided is ten thousand shares of the par value of one hundred dollars (\$100) each. All such capital stock having been issued to such purchaser and associates as fully-paid stock in part consideration of the transfer to the corporation hereby formed of the property [fol. 78] so sold as aforesaid.

Fifth. The name and place of residence of each of its stockholders is as follows: Samuel Spencer, New York, N. Y.; Charles H. Coster, New York, N. Y.; Alexander B. Andrews, Raleigh, N. C.; Francis Lynde Stetson, New York, N. Y.; William A. C. Ewen, Dobbs Ferry, N. Y.; Thomas W. Bullitt, Louisville, Ky.; William H. Baldwin, Jr., Washington, D. C.

Sixth. The time when said corporation is to commence is the date of the filing of these articles, and it is to continue in perpetuity.

Seventh. The affairs of the Corporation are to be conducted by five directors, who shall hold office until the first meeting of the stockholders of the company to be held; and the names of the first Board of Directors shall be Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, William H. Baldwin, Jr. The first annual election of directors shall be held at Louisville on the first Monday of August, 1895.

Eighth. The highest amount of indebtedness or liability which the corporation may at any time incur is ten million dollars (\$10,000,000.)

[fol. 79] Ninth. The private property of the stockholders is not subject, under any circumstances, to the payment of the debts of the corporation.

Tenth. The places from and to which, and the name of each County into *of* through which the said railroad is now constructed and is intended to be operated, are hereinbefore truly set forth. Its length, as near as may be, is one hundred and thirty and five-tenths (130.5) miles.

In witness whereof, we have executed, signed and acknowledged these Articles this seventeenth day of August, 1894.

— — —, Purchaser. — — —, Associate.

Witness: — — —.

STATE OF — — —,

County of — — —:

I, — — —, do hereby certify that the foregoing instrument in writing, or Articles of Incorporation, were this day produced to me [fols. 80-82] by the parties and were severally acknowledged by the said Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt and William H. Baldwin, Jr., to be their act and deed.

My commission expires — — —.

Given under my hand and seal of office this — of August, 1894.

[File endorsement omitted.]

JUDGMENT—Omitted; printed side page 60 ante

[fol. 83] IN COUNTY COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Kentucky, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and WALKER D. HINES, Director
General, Defendants

JUDGMENT—Filed Sept. 29, 1920

[fol. 84] Came the parties and filed stipulations and by consent these two cases are heard together and the cases being submitted to the Court and the Court being advised it is adjudged by the Court

that the plaintiff's petitions be dismissed and that plaintiff take nothing thereby to all of which plaintiff excepts and prays an Appeal which is granted.

A True Copy:

Attest:

R. H. Gray, Clerk Woodford County Court, by Jno. M. Gray,
D. C.

[File endorsement omitted.]

[fol. 85] IN COUNTY COURT OF WOODFORD COUNTY

PETITION

The plaintiff, Commonwealth of Kentucky states that Robert Hawkins is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant, Southern Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky and other counties of this state as well as other states in the Union. During the year ended June 30, 1917 said defendant operated, owned, leased and controlled various lines of Railroad in Kentucky and elsewhere; and under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for the taxing of 1918.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before October 1st thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock; preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and un-
[fol. 86] divided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest or investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; also the gross and net income or earnings received

in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June in the year in which the assessment is required to be made.

Said defendant, Southern Railway Company failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky, reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of \$2,137,072, as the true and total value of its [fol. 87] property in this State. A copy of said report is filed as part hercof marked No. 13. The length of the lines of the Southern Railway Company in Kentucky within this State for said year was 160.45 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by the said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$1,243,926, as a true and total value of its property in the State. A copy of said report is filed herewith marked No. 14. The length of lines of said Mobile & Ohio Railroads Company within Kentucky was 44.44 miles for said year.

The Cumberland Railroad Company is a corporation, duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times herein mentioned defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said years, and as assessment was made against said Cumberland Railroad Company of its property and franchise in the sum of \$103,380, as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 15. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with power to act as [fol. 88] a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting

only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$15,675, as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 16. The length of the lines of said Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way, or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the name of the four said subsidiary companies. Said defendant at all times herein mentioned, operated, owned, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this state and escaping taxation; and did thereby conceal a portion of the defendant's property in Kentucky to be omitted from assessment; to-wit, the franchise of the said defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 219.88 miles, and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant [fol. 89] in fact operated, owned, leased and controlled in this state for said year the said 219.88 miles and same were a part of its total system of railroads extending into the various states of said Union. Both in and outside of this state, said defendant for said year operated, owned, leased, and controlled 9,251.42 miles of railroad; and said mileage wholly within this state amounted to 2.5% thereof. The net earnings or income of said defendant for said year were \$45,312,000.00. Said net income or earnings when capitalized at 6% amount to \$755,200,000.00, which sum is the true total value of the whole property of said defendant, both in and out of Kentucky for said year. For said year there was within this state 2.5% of said whole property, or \$18,880,000.00. The total value of the property of said defendant, Southern Railway Company, for said year in this State was \$18,880,000.00 said defendant in the name of said subsidiary corporations paid taxes in Kentucky on \$3,500,053.00 being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of the defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1918^m was of value \$15,379,947.00 and taxes on said sum are now just, due and unpaid.

The defendant, Walker D. Hines, or his predecessor in office, was at all times herein mentioned the duly appointed, qualified and acting Director General of Railroads. Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to twenty (20%) per

centum penalty on all state and county taxes colle-d in this action. [fol. 90] Wherefore, the plaintiff prays that the omitted portion of the franchise of the defendants as hereinbefore set out, be assessed for taxation, for the year 1918, and certified to the Auditor of Public Accounts for collection on behalf of the state tax, and for certification and apportionment to the various collecting officers of the Counties in or through which said company operated its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley, and Woodford. The relator herein be adjudged entitled to his commission of twenty per cent penalty against the defendants on the various accounts respectively due the State and each of said counties; that defendant be required to answer the interrogatories hereto annexed and further prays for his costs and all proper relief.

Paragraph Two

The plaintiff, Commonwealth of Kentucky, states that Robert Hawkins, is the duly elected, qualified and acting Sheriff of Woodford County, Kentucky. The defendant Douthier Railway Company is a corporation organized and existing under the laws of the State of Virginia with power to sue and be sued as a natural person; and was at all times herein mentioned and now is a railway company having and exercising a special and exclusive privilege or franchise not allowed by law to natural persons, and performing a public service as a common carrier of passengers and freight for hire in Woodford County, Kentucky and other counties of this state as well as other states in the Union. During the year ended December 31st, 1913, said defendant operated, owned, leased and controlled various lines of railroad in Kentucky and elsewhere; and [fol. 91] under the Kentucky Statutes made and provided, was liable for the payment of a franchise tax thereon, for taxing year of 1919.

Under the Kentucky Statutes, so made and provided, it was the duty of said defendant for said year to file a report with the Auditor of Public Accounts before March thirty-first thereof showing the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock; preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thir-y-first day of December of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets, the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest or investments, and incomes from all other sources for twelve months next preceding the thirty-first day of December of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at

a fair voluntary sale; also the gross and net income or earnings received in this state and out of this state, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirty-first day of December of the year which the assessment is required to be made.

[fol. 92] Said defendant, Southern Railway Company failed and refused to file said report or any report. The Southern Railway Company in Kentucky is a corporation organized and existing under the laws of this State with power to act as a common carrier, but its entire capital stock at all times herein mentioned was owned by defendant, and said Southern Railway Company in Kentucky had been theretofore merged into the defendant corporation. A report was filed by the Southern Railway Company in Kentucky, reporting only the length of the lines operated by it and its property and earnings for said year, and an assessment was made against said Southern Railway Company in Kentucky, of its property and franchise so reported in the sum of \$2,139,072 as the true and total value of its property in this State. A copy of said report is filed as part hereof marked No. 17. The length of the lines of said Southern Railway Company in Kentucky within this State for said year was 160.45 miles.

The Mobile & Ohio Railroad Company is a corporation duly organized under the laws of the State of Alabama with power to act as a common carrier, but the defendant controlled same and owned the majority of its capital stock at all times herein mentioned. A report was filed by said Mobile & Ohio Railroad Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so reported in the sum of \$1,242,385 as the true and total value of its property in the State. A copy of said report is here filed as marked No. 18. The length of lines of said Mobile & Ohio Railroad Company within Kentucky was 44.44 miles for said year.

[fol. 93] The Cumberland Railroad Company is a corporation, duly organized under the laws of the State of Kentucky, with like powers as a common carrier. At all times herein mentioned defendant controlled said Cumberland Railroad Company and owned the whole of its capital stock. A report was filed by said Cumberland Railroad Company reporting only the length of lines operated by it and its property and earnings for said year, and an assessment was made against said Cumberland Railroad Company, of its property and franchise in the sum of \$103,380 as the true and total value of its property in this State. A copy of said report is filed herewith marked No. 19. The length of the lines of said Cumberland Railroad Company within Kentucky for said year was 12.90 miles.

The Cumberland Railway Company is a corporation duly organized under the laws of the State of Tennessee with the power to act as a common carrier, but the defendant controlled same and owned the whole of its capital stock at all times herein mentioned. A report was filed by said Cumberland Railway Company reporting only the length of the lines operated by it and its earnings for said year. An assessment was made against it of its property and franchise so re-

ported in the sum of \$15,675 as the true and total value of its property in the State. A copy of said report is filed as part hereof marked No. 20. The length of the lines of the Cumberland Railway Company in Kentucky was 2.09 miles for said year.

No report was filed or assessment made in any way or in any form of the franchise of the defendant, and all its property and franchise were wholly omitted from assessment; except the said property embraced in said reports which were in fact filed by the defendant in the [fol. 94] name of the four subsidiary companies. Said defendant at all times mentioned, operated, leased and controlled the lines of the four said subsidiary companies and well knew its duties as herein above set out; and said defendant filed said reports in the manner and form alleged for the purpose of concealing its property in this State and escaping taxation; and did thereby conceal a portion of its property and cause thereby a large portion of the defendant's property in Kentucky to be omitted from assessment; to-wit, the franchise of the said defendant. No part of said franchise was assessed for taxation in said year and all of same was omitted from assessment, except as above stated.

The mileage reported within Kentucky in the name of said four subsidiary corporations, for said year was 219.88 miles; and each of said miles was at all times a part of the general system of said defendant extending into the various states of the Union. Said defendant in fact operated, owned, leased and controlled in this State for said year the said 219.88 miles and same were a part of its total system of railroad extending into the various states of said Union. Both in and outside of this State, said defendant for said year operated, owned, leased and controlled 9,251.42 miles of railroad; and said mileage wholly within this State amounted to 2.5% thereof. The net earnings or income of said defendant for said year were \$43,865,000.00. Said net income or earnings when capitalized at 6% amount to \$731,083,000.00, which last mentioned sum is the true and total value of the whole property of said defendant, both in and out of Kentucky for said year. For said year there was within this State 2.5% of said whole property, or \$18,277,175.00. The total value of the property of said defendant, Southern Railway Company, for [fol. 95] said year, in this State was \$18,277,075.00 said defendant in the name of said subsidiary corporations paid taxes in Kentucky on \$3,500,512.00, being the assessed value of the property and franchise of said four subsidiary corporations and the difference between said sums, being the intangible property of defendant in Kentucky was wholly omitted from assessment and taxation. Said portion of defendant's property in Kentucky omitted from assessment for said year 1919, was of value \$15,776,563.00 and taxes on said sum are now just, due and unpaid.

The defendant, Walker D. Hines, or his predecessor in office, was at all times herein mentioned the only appointed, qualified and acting Director General of Railroads, Robert Hawkins, Sheriff of Woodford County, relator herein is entitled to twenty (20%) per centum penalty on all state and county taxes collected in this action.

Wherefore, The plaintiff prays that the omitted portion of the

franchise of the defendants as hereinbefore set out, be assessed for taxation, for the year 1919, and certified to the Auditor of Public Accounts for collection on behalf of the State tax, and for certification and apportionment to the various collecting officers of the counties in or through which said company operated its railroad, to-wit: Anderson, Ballard, Bell, Boyle, Carlisle, Fayette, Fulton, Hickman, Jefferson, Knox, Mercer, Scott, Shelby, Whitley, and Woodford. That relator herein be adjudged entitled to his commission of twenty per cent penalty against the defendants on the various accounts respectively due the state and each of said counties; that defendants be required to answer the interrogatories hereto annexed and further [fol. 96] prays for his costs and all proper relief.

Hazelrigg & Hazelrigg, L. M. Morris, Hobson & Hobson, Will D. Jesse, County Attorney, Attorneys for Plaintiff.

IN COUNTY COURT OF WOODFORD COUNTY

INTERROGATORIES

I. In the Statistics of Railways in the United States compiled by the Interstate Commerce Commission for the year ended June 30, 1913, opposite the name of the "Southern Railway in Kentucky" are these words: "Merged in Southern Railway Company. July 1, 1912." Is that statement true? And if so, what change, if any, has been made since and when?

II. The defendants company will answer the following interrogatories for the year ended June 30, 1917.

1. What was the total mileage of railroad lines which were operated, owned, leased and controlled by the ownership of a majority of the capital stock?

2. What were the names of the railways which were owned, operated, leased and controlled by the defendant company? Give the length of each line, including the lines operated in other names but of which defendant company owned a majority of the capital stock.

3. Which of the roads listed in answer to the following question reported to the Interstate Commerce Commission as operating railways?

[fol. 97] 4. How much of the mileage disclosed in the answer to question two, was within Kentucky; and what lines within Kentucky did defendant company control by owning a majority of the capital stock of the corporation in whose name it was operated?

5. Give the name of each county in Kentucky and the number of miles of railroad therein which defendant company or the "Southern Railway Company in Kentucky" or Mobile & Ohio Railroad, or Cumberland Railroad, or Cumberland Railway operated?

6. Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give the counties in which operations were carried on and mileage therein.

7. What was the total of the railway operating revenues for each of the roads listed in the answer to question two above?

8. What was the total railway operating expenses for each of said roads.

9. What were the total railway tax accruals for each of said roads?

10. What was the total non-operating income for each of said roads?

11. What further amounts of money were deducted from incomes of each of said roads to determine the profit and loss for said year? Give general classification and amount.

12. Explain briefly the nature of each of these deductions- that is explain what the deductions represent or the nature of the expense.

[fol. 98] 13. Name the officers and directors of the "Southern Railway in Kentucky" and state what relation, if any, each of them bore to defendant company.

14. Name the officers and directors of the Mobile & Ohio Railroad and state what relation, if any, each of them bore to defendant company.

15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant Company.

16. Name the officers and directors of the Cumberland Railway and state what relation, if any, each of them bore to defendant company.

17. Explain the relationship between the Southern Railway Company (corporate) and the Southern Railroad (Federal) with regard to income, expenses, taxes, accounting; and mileage operated.

18. What interest if any, did the defendant, Southern Railway Company, or any one or more of its subsidiaries have in the capital stock, management, directorate or control of the Cincinnati New Orleans and Texas Pacific Railway Company? Did defendant or any one or more of its subsidiaries operate, own, lease or control same?

III. The defendant will answer each of the above eighteen interrogatories for the year ending December 31, 1918.

Said Statement and Interrogatories are endorsed as follows; Filed March 8th. 1920. Attest R. H. Gray, Clerk. Summons & 2 Copies Woodford Co. Summons & 1 copy to Jefferson Co. 3/15/20.

[fol. 99] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ORDER REVIVING CAUSE AGAINST JOHN BARTON PAYNE—May 24,
1920

Comes plaintiff and filed amended statement making John Barton Payne as Agent of the President of the United States under the Transportation Act of Congress of February 28, 1920, defendant herein, and it is ordered that this action be revived against said John Barton Payne as such Agent, and process is awarded against him, and this cause is contin-ed.

[fol. 100] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED STATEMENT MAKING JOHN BARTON PAYNE DEFENDANT—
Filed May 24, 1920

Plaintiff amends its statement herein and says that the term of Walker D. Hines as Director General of Railroads has expired, that thereafter he was made agent of the President of the United States under the Transportation Act of Congress of February 28, 1920 and has since resigned as such and that John Barton Payne has been appointed as such agent of the President of the United States under the Transportation Act and is now such agent.

Plaintiff makes said John Barton Payne as agent of the President of the United States under the Transportation Act of Congress of February 28, 1920, Sec. 206 a defendant hereto and prays process and for judgment as prayed in its Statement and all proper relief.

W. D. Jesse, Hazelrigg & Hazelrigg, L. W. Morris, Hobson
& Hobson, for Plaintiff.

[File endorsement omitted.]

[fol. 101] IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED STATEMENT—Filed June 10, 1920

Plaintiff amends its statement and says that John Barton Payne is Director General of Railroads and agent under Section 206 of the Transportation Act of 1920. Plaintiff makes John Barton Payne, Director General of Railroads, as agent under Section 206

of the Transportation Act of 1920 defendant hereto and prays process and for judgment as in its statement and for all proper relief.

[File endorsement omitted.]

[fol. 102] IN COUNTY COURT OF WOODFORD COUNTY

MINUTE ENTRIES

This day came the defendant, Southern Railway Company and filed its demurrer to the Statement of the Plaintiff Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, Kentucky; and also came the defendant, John Barton Payne, Director General of Railroads as Agent under Section 206 of the Transportation Act of 1920, and filed his demurrer to the statement of said plaintiff.

Without waiving said demurrers but expressly replying thereon, said defendants filed their answer herein.

Thereupon came the plaintiff and filed its reply to said answer; and it is agreed that the affirmative allegations may be abd they are hereby by the defendant traversed of record.

IN COUNTY COURT OF WOODFORD COUNTY

ORDER FILING STOCKHOLDERS' REPORT—June 28, 1920

Came Plaintiff and tendered and moved to file herein as evidence the stockholders reports for the years 1917 and 1918 issued by the defendant, to which the defendants objected, and the motion is submitted to the Court, and the Court being advised said objections are overruled and said reports are ordered to be and they are hereby filed, to which ruling of the Court as to each report the defendants object and except, and this case is continued.

[fol. 103] Said Order is endorsed as follows, to-wit: "Entered in Order Book No. 4 page 542."

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER—Filed June 28, 1920

The defendant, Southern Railway Company, demurs to the Statement of the plaintiff, Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, because the same

does not state facts sufficient to support or constitute cause of action [fol. 104] against it.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attys.
for Deft. Southern Ry. Co.

[File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

DEMURRER OF JOHN BARTON PAYNE—Filed June 28, 1920

The defendant, John Barton Payne, Director General of Railroads as Agent of Section 206 of the Transportation Act of 1920, demurs to the statement of the plaintiff, Commonwealth of Kentucky on Relation of Robert Hawkins, Sheriff of Woodford County, because the same does not state facts sufficient to support or constitute a cause of action against him.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attys.
for Deft. John Barton Payne, Director General of Railroads, etc.

[fol. 105] Exhibit A for 1918 is in words and figures as follows, to-wit:

Mileage Statistics

Owned, Leased, and Controlled by Southern Railway Company
Operated by United States Railroad Administration, 1918

Owned:

Southern Railway Company.....	4,213.96
-------------------------------	----------

Leased:

Southern Railway-Carolina Division.....	755.12
Virginia & Southwestern Railway.....	188.96
Elberton Southern Railway.....	50.60
Mobile & Birmingham Railroad.....	150.35
Richmond & Mecklenburg Railroad.....	31.30
Georgia & Midland Railway.....	97.88
Memphis-Chattanooga Railway.....	2.83
North Carolina Midland Railroad.....	225.95
Atlanta & Charlotte Air Line Railway.....	263.08
Atlantic & Danville Railway.....	277.71
North & South Carolina Railroad.....	3.73
Lockhart Railroad.....	13.81
Wooldridge-Jellico Coal Co.....	1.75
	<hr/> 2,116.59

Operated under Agreement:

Southern Railway Company in Mississippi.....	11.40
Trackage Rights.....	517.50

[fol. 106] Controlled by Ownership of Stock:

State University Railroad.....	10.20
Sievern & Knoxville Railroad.....	17.44
Ensley Southern Railway.....	33.42
Roswell Railroad.....	12.55
Cumberland Railway.....	11.21
Tennessee & Carolina Southern Railway.....	29.89
Southern Railway in Kentucky.....	127.64
The Alabama Great Southern Railroad Co....	312.27
Atlantic & Yadkin Railway Co.....	163.10
Ashville & Graggy Mountain Railway Co.....	4.44
Blue Ridge Railway Co.....	44.00
Cumberland Railroad Co.....	12.90
Carolina & Tennessee Southern Railway Co..	13.90
Danville & Western Railway Co.....	80.78
Georgia Southern & Florida Railway Co.....	402.05
Hartwell Railway Company.....	10.10
High Point, Randleman, Ashboro & Southern	27.98
Mobile & Ohio Railroad Company.....	991.05
New Orleans & North Eastern.....	214.73
Northern Alabama Railway Company.....	112.50
Tallulah Falls Railway Co.....	58.00
Yadkin Railroad Company.....	52.23
	<hr/>
	2,742.38
	<hr/>
	9,601.83

Exhibit B for 1918 is in words and figures as follows to-wit (two sheets):

[fol. 107] [File endorsement omitted.]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

ANSWER—Filed June 28, 1920

The defendants, Southern Railroad Company and John Barton Payne, Director General of Railroads, acting as agent under Section 206 of the Transportation Act of 1920, answering the statement filed herein, state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated, for the whole of the years 1918 and 1919, all of the rail-

roads and railroad property owned, operated, leased or controlled by the Southern Railroad Company.

The defendants deny that it was the duty of these defendants or of either of them, for the taxing year mentioned in the first paragraph of the statement, viz., 1918, to file any report to the Auditor of Public Accounts, of any kind, or of the kind mentioned in the [fol. 108] Statement, except in so far as it was the duty of the Director General to file the reports for the four railroads named in the Statement as having lines in Kentucky, and for railroads in no way involved herein.

Defendants deny that they or either of them had or exercised any franchise whatever in the State of Kentucky except franchises belonging to the said four railroads, and, as to the Director General, franchises for railroads in no way involved herein. Defendants state that the Director General operated each of said four railroads under the franchises of the respective roads, and a report was filed on behalf of the Director General for each of said roads, with the proper authorities of the State of Kentucky.

Defendants deny that the Southern Railway Company operated or owned any of the lines of the said four subsidiary companies; deny that either of the defendants was under any duty whatever to file any report other than the reports which were filed and which *and* referred to in plaintiff's Statement. Defendants deny that said reports were filed for the purpose of concealing any property of either or for the purpose of escaping taxation on any property of either of these defendants in this state, and they deny that either of them did thereby conceal any property or cause any property to be omitted from assessment, and deny that the franchises of the Southern Railway Company were subject in any way to assessment in Kentucky.

Defendants say that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the [fol. 109] names of the persons who were elected directors. Defendants admit that said defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares. As to the Cumberland Railroad Company, defendants say that during the period in controversy there was outstanding in the names of directors a sufficient quantity of its capital stock to qualify them as such.

In reference to the Cumberland Railway Company, the defendants say that there was outstanding in the name of its directors, during the period in controversy, a sufficient quantity of its capital stock to qualify them as such.

Defendants deny that any of said miles of railroad belonging to the said four companies were at any time a part of the general system of the defendant, Southern Railway Company, extending into various states of the Union, except as to the fact, which is admitted, that said Southern Railway Company owned a majority of the stock in each of said separate corporations: Southern Rail-

way Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky; and the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

Defendants state that none of the property above described was in any way omitted from assessment by the State of Kentucky; and [fol. 110] they deny that any property or any franchise was omitted from assessment.

The total mileage of the defendant, Southern Railway Company, for the period stated in the first paragraph of the Statement, was 9,761.36 miles; and the mileage of the lines mentioned in the said first paragraph of the Statement was 219.88 miles; so that the proportion of the mileage of the said four railroads in Kentucky to the total mileage of said defendant, Southern Railway Company, owned, operated, leased and controlled, was 2.252 per cent.

Defendants deny that the net earnings or income of the defendant, Southern Railway Company, including interest and dividends received from securities held by it, for said year, was the amount set forth in the first paragraph of the Statement, or anything more than \$25,043,853.67. Defendants state that this sum capitalized at 7 per cent would amount to \$357,769,338.10.

Defendants will state in a subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the first paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendants deny that the amount set out in the Statement was the true total value of the whole property of the defendant, Southern Railway Company, in and out of Kentucky, for said year, or that [fol. 111] it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendants now deny that any portion of said defendant Southern Railway Company's property in Kentucky was omitted from assessment for the year 1918, or that it had any property in Kentucky subject to assessment for said year.

Paragraph 2

In answer to the second paragraph of said Statement the defendants state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated, for the whole of the years 1918 and 1919, all of the railroads and railroad property owned, operated, leased or controlled by the Southern Railway Company.

The defendants deny that it was the duty of these defendants or of either of them, for the taxing year mentioned in the second

paragraph of the Statement, viz., 1919, to file any report to the Auditor of Public Accounts, of any kind, or of the kind mentioned in the statement, except in so far as it was the duty of the Director General to file the reports for the four railroads named in the Statement as having lines in Kentucky, and for railroads in no way involved herein.

Defendants deny that they either of them had or exercised any franchise whatever in the State of Kentucky except franchises belonging to the said four railroads, and, as to the Director General, franchises for railroads in no way involved herein. Defendants [fol. 112] state that the Director General operated each of said four railroads under the franchises of the respective roads, and a report was filed on behalf of the Director General for each of said roads, with the proper authorities of the State of Kentucky.

Defendants deny that the Southern Railway Company operated or owned any of the lines of the said four subsidiary companies; deny that either of the defendants was under any duty whatever to file any report other than the reports which were filed and which are referred to in plaintiff's Statement. Defendants deny that said reports filed for the purpose of concealing any property or for the purpose of escaping taxation on any property of either of these defendants in this State, and they deny that either of them did thereby conceal any property or cause any property to be omitted from assessment, and deny that the franchises of the Southern Railway Company were subject in any way to assessment in Kentucky.

Defendants say that as to the capital stock of the Southern Railway Company in Kentucky there were outstanding in the period in controversy eighteen (18) shares of such stock in the names of the persons who — elected directors. Defendants admit that said defendant was the beneficial owner in the rest of said stock, the total stock outstanding being 10,000 shares.

As to the Cumberland Railroad Company, defendants say that during the period in controversy there was outstanding in the names of the directors a sufficient quantity of its capital stock to qualify them as such.

[fol. 113] In reference to the Cumberland Railway Company, the defendants say that during the period in controversy there was outstanding in the name of its directors a sufficient quantity of its capital stock to qualify them as such.

Defendants deny that any of said miles of railroad belonging to the said four companies were at any time a part of the general system of the defendant, Southern Railway Company, extending into various States of the Union, except as to the fact, which is admitted, that said Southern Railway Company owned a majority of the stock in each of said separate corporations: Southern Railway Company in Kentucky, a corporation organized and existing under the laws of the State of Kentucky; the Mobile & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Alabama; the Cumberland Railroad Company, a corporation organized and existing under the laws of the State of Kentucky;

and the Cumberland Railway Company, a corporation organized and existing under the laws of the State of Tennessee.

Defendants state that none of the property above described was in any way omitted from assessment by the State of Kentucky; and they deny that any property or any franchise was omitted from assessment.

The total mileage of the defendant, Southern Railway Company, for the period stated in the second paragraph of the Statement, was 9601.83 miles; and the mileage of the lines mentioned in the said second paragraph of the Statement was 219.88 miles—so that the [fol. 114] proportion of the mileage of the said four railroads in Kentucky to the total mileage of said defendant, Southern Railway Company, owned, operated, leased and controlled, was 2.289 per cent.

Defendants deny that the net earnings or income of the defendant, Southern Railway Company, including interest and dividends received from securities held by it, for said year, was the amount set forth in the second paragraph of the Statement, or anything more than \$30,435,314.39. Defendants state that this sum capitalized at 7 per cent would amount to \$434,833,062.71.

Defendants state that in subsequent paragraph of this answer how the taxing authorities of the State of Kentucky for the year dealt with in the second paragraph of the Statement ascertained the value of railroad property in the State of Kentucky and determined the amount thereof apportionable to this State; and defendant hereby makes its allegations in that respect applicable to each of the paragraphs of the Statement.

Defendants deny that the amount set out in the statement was the true total value of the whole property of the defendant, Southern Railway Company, in and out of Kentucky, for said year, or that it was anything like that sum. This value will be more particularly dealt with in other parts of this answer, and the defendants now deny that any portion of said defendant Southern Railway Company's property in Kentucky was omitted from assessment for the year 1919, or that it had any property in Kentucky subject to assessment for said year.

[fol. 115]

Paragraph 3

Further answering, these defendants say that for the taxing years 1918 and 1919 dealt with in the Statement herein, the assessing authorities of the State of Kentucky—The State Tax Commission—have uniformly established and acted upon a rule of ascertaining the value of the franchise of railroad companies subject to assessments in Kentucky, which was applied to all of said railroads. This rule was to ascertain the net earnings of the said railroad company, taxes being deducted, and then to capitalize these net earnings at 7 per cent, and then to take 70 per cent of the amount thus arrived at, and to fix the amount thus determined as the value of the capital stock of said railroad. And this was the method uniformly applied by said assessing authorities of the State of

Kentucky as aforesaid during the periods mentioned in the statement to which this answer is a response.

The defendants further say that for each of the taxing years mentioned in the Statement herein local assessors and other assessing officers of the State of Kentucky assessed the property of individuals and of corporations within their property, of duty, comprising 80 per cent of the total taxable property, at not exceeding 60 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually has been a matter of public notoriety in [fol. 116] the State; that notwithstanding this the said Tax Commissioner has adopted a method which resulted in an assessment of railroad tangible and intangible property at 70 per cent of its fair cash value.

The defendants say that having ascertained the value of the capital stock of the railroads in this State subject to assessment by the above described method the taxing authorities ascertained the total mileage of all lines owned, operated, leased and controlled by said several companies, and assigned to Kentucky that proportion of the thus ascertained value of the capital stock of the lines owned, operated, leased and controlled, that the said lines in Kentucky bore to the total length of said lines. From this value of the capital stock so ascertained there was deducted the tangible property of said several railroads assessed in Kentucky.

Defendants say that it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof, for this Court to adopt any method in making an assessment herein (if any could be made) on a less favorable basis to defendants than the one above described.

Paragraph 4

And the defendants further say that in none of said periods did the defendant, Southern Railway Company, have any tangible property in the State of Kentucky; that it had no intangible property in the State of Kentucky during said periods; that if the Court should [fol. 117] be of opinion, under all the facts and circumstances of this case, that the property in Kentucky, tangible and intangible, of the four railroads mentioned in the statement herein should be assessed against these defendants, or either of them, then these defendants say that this assessment has already been made by the State Tax Commission for each of said years; that is to say, the tangible property of each of said corporations has been assessed; the value of the capital stock of each of said corporations has been ascertained; the total value of the tangible and intangible property of each of said companies has been ascertained and all the taxes paid thereon; that in order that the value of the capital stock of these four corporations assignable to Kentucky should be determined the said taxing authorities have taken into consideration all the facts necessary to that end, and have fixed the value of the tangible property and of the franchise of each of said corporations as aforesaid.

Defendants further say that as contributing to the earnings of the defendant, Southern Railway Company, and to the value of its capital stock, said Railway Company owned, and said Director General operated, in states other than Kentucky, during said several years, many miles of double track, that is, as of December 31, 1917, 656.43 miles; as of December 31, 1918, 715.86 miles; whereas all the lines in Kentucky of the corporations mentioned in the statement herein were single track; that this double track mileage cost a very large sum and contributed very largely to the earnings of the property; that besides this, the said defendant had at various points [fol. 118] on its line very expensive, costly and valuable terminals and machine shops, such as at Spencer, North Carolina, Knoxville, Tennessee, Atlanta, Georgia, and other points; that none of the railroads mentioned in the statement herein had in Kentucky valuable property of this character.

Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the Fourteenth Amendment thereof.

And so it is that these defendants say that if the Court should hold that the Southern Railway Company is subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of any or all of the lines of railroad mentioned herein, then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers of the State of Kentucky, and to attempt to add to that assessment would be a violation of the Constitution of the State of Kentucky and the Constitution of the United States, particularly the Fourteenth Amendment thereof; and the defendants pray that this suit may be dismissed, and for all proper relief.

Wallace & Harriß, Humphrey, Crawford & Middleton,
Attorneys for Defendants.

[fol. 119] IN COUNTY COURT OF WOODFORD COUNTY

Southern Railway Company & Director General U. S. R. R. Adm.

ANSWERS TO INTERROGATORIES—Filed June 28, 1920

Q. 1. What was the total mileage of railway lines which were owned, operated, leased and controlled by defendant company; including lines controlled by the ownership of a majority of the capital stock?

A. 1917, 9,761.36 miles; 1918, 9,601.83 miles.

Q. 2. What were the names of the railroads which were owned, operated, leased and controlled by defendant company? Give the

length of each line, including the lines operated in the name of defendant company; and those operated in other names but of which defendant company owned a majority of the capital stock.

A. See Exhibit A for 1917 and A for 1918.

Q. 3. Which of the roads listed in answer to the foregoing question reported to the Interstate Commerce Commission as operating railways?

A. —

1917

The A. G. S. R. R. Co.
Atlantic & Yadkin Ry. Co.
Ashville & Craggy Mtn.
Blue Ridge Ry. Co.
Cumberland R. R. Co.
[fol. 120]
Carolina & Tenn. Southern
Danville & Western Ry. Co.
Ga. Sou. & Fla. Ry. Co.
Hartwell Ry. Co.
High Point, Randleman, Ash-
boro & Sou.
Mobile & Ohio R. R. Co.
New Orleans & Northeastern
R. R. Co.
Northern Ala. Ry. Co.
Tallulah Falls Ry. Co.
Yadkin R. R. Co.
Sou. Railway Co.

1918—Federal Operation 2

The A. G. S. R. R. Co.
Atlantic & Yadkin Ry. Co.
Ashville & Craggy Mtn.
Blue Ridge Ry. Co.

Caroline & Tenn. Southern.
Danville & Western Ry. Co.
Ga. Sou. & Fla. Ry. Co.
Hartwell Ry. Co.
High Point, Randleman, Ash-
boro and Sou.
Mobile & Ohio R. R. Co.
New Orleans & Northeastern
R. R. Co.
Northern Ala. Ry. Co.
Tallulah Falls Ry. Co.
Yadkin R. R. Co.
Sou. Railway Co.

Q. 4. a. How much of the mileage disclosed in the answer to question two was within Kentucky; and

b. What lines within Kentucky did defendant company control by owning a majority of the capital stock of the corporation in whose name it was operated.

A. a. 1917, 187.07 miles; 1918, 187.07 miles.

b. 1917 and 1918, Southern Ry. Co. in Ky., Cumberland R. R., Cumberland Ry., Mobile & Ohio.

[fol. 121] Q. 5. Give the names of each county in Kentucky and the number of miles of railroad therein which defendant company or the "Southern Railway Company in Kentucky," or Mobile & Ohio Railroad, or Cumberland Railroad, or Cumberland Railway operated.

A. —

2 (Reports of operation for 1918 were rendered to the Interstate Commerce Commission by the Federal Railroad Administration.)

Mobile & Ohio Railroad:

Fulton County.....	6.635	miles
Hickman County.....	17.052	"
Carlisle County.....	10.576	"
Ballard County.....	4.430	"

Total 38.693 miles #

Southern Railway in Kentucky:

Main Line:

Jefferson County.....	21.387	miles
Shelby County.....	24.299	"
Anderson County.....	17.555	"
Mercer County.....	18.229	"
Boyle County.....	2.000	"

Total, Main Line..... 83.470 "

Lexington Branch:

Anderson County.....	3.347	"
Woodford County.....	12.047	"
Fayette County.....	8.206	"

Total, Lexington Branch..... 23.600 "

[fol. 122] Georgetown Branch:

Woodford County	9.138	miles
Scott County.....	7.600	"

Total, Georgetown Branch..... 16.738 "

Burgin Branch:

Mercer County.....	3.820	miles
--------------------	-------	-------

Total, Burgin Branch..... 3.820 "

Grand Total.....127.628 miles #

Cumberland Railway:

Bell County.....	1.74	miles
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Cumberland Railway Co:

Knox County.....	12.90	"
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Does not include lines operated under trackage rights.

Q. 6 Did any other company listed in answer to question two above operate within Kentucky? If so, which of them and give counties in which operations were carried on and the mileage therein.

A. No.

Q. 7. What was the total of the railway operating revenues for each of the roads listed in the answer to question two above?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 8. What was the total railway operating expenses for each of said roads?

[fol. 123] A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 9. What were the total railway tax accruals for each of said roads?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 10. What was the total non-operating income for each of said roads?

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 11. What further amounts of money were deducted from each of said roads to determine the profit and loss for said year? Give general classification and amount.

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 12. Explain briefly the nature of each of these deductions, that is explain what the deductions represent or the nature of the expenses.

A. See Exhibit B for 1917 and B for 1918 (two sheets).

Q. 13 Name the officers and directors of the "Southern Railway Company in Kentucky" and state what relation, if any, each of them bore to the defendant company.

A. —

Directors

1917

1918

W. S. Camp
Fairfax Harrison #
C. E. A. McCarthy
E. A. Merrill
H. B. Spencer #
F. S. Wynn

W. S. Camp
Fairfax Harrison #
E. A. Merrill
C. E. A. McCarthy
H. B. Spencer
F. S. Wynn

[fol. 124]

Officers

1917

1918

President, Fairfax Harrison #	Fairfax Harrison #.
Vice-President, J. M. Culp	L. E. Jefferies #.
" T. C. Powell #	H. B. Spencer #.
" H. B. Spencer	H. W. Miller #.
" H. W. Miller #	J. B. Munson #.
Secretary, F. S. Wynn #	F. S. Wynn #.
Treasurer, H. C. Ansley #	F. S. Wynn #.
General Counsel, F. L. Stetson #	F. L. Stetson #.
General Counsel, A. P. Humphrey #	_____.
Comptroller, A. H. Plant #	E. H. Kemper #.
General Manager, E. H. Coapman #	_____.

Q. 14. Name the officers and directors of the Mobile & Ohio Railroad and state what relation, if any, each of them bore to defendant company.

A.—

Directors

1917

1918

Albert P. Bush	Albert P. Bush
Guy Cary	Guy Cary*
Johnston Deforest	Johnston Deforest
Henry Hall	Henry Hall
Fairfax Harrison*	Fairfax Harrison*
Adrian Iselin, Jr.*	Adrian Iselin
Ernest Iselin	Ernest Iselin
[fol. 125] W. Emlen Roosevelt	H. W. Miller*
C. Sidney Shepard	W. Emlen Roosevelt
H. B. Spencer*	C. Sidney Shepard
H. M. Street	H. M. Street
R. V. Taylor	Samuel Woolverton
Samuel Woolverton	F. S. Wynn

Officers

1917

1918

President, Fairfax Harrison #	Fairfax Harrison #.
V-Pres. & Gen. Mgr., R. V. Taylor	V. P. L. E. Jefferies #.
Treasurer, H. C. Ansley #	V. P. H. W. Miller #.
Comptroller, C. B. Hayes	V. P. C. B. Hayes.
Gen. Counsel, S. R. Prince	_____.
Secy., F. S. Wynn #	Secy., F. S. Wynn #.
Asst. Secy. & Asst. Treas., Geo. A. Cooke	Compt. E. H. Kemper #.
Gen. Supt., E. C. Rendell	_____.
Frt. Trf. Mgr., Haiden Miller	_____.
Gen. Frt. Agt., J. M. Denyven	_____.
Gen. Pass. Agt., C. Rudolph	_____.

*Also Directors Southern Railway Co.

‡Held similar office with Southern Railway Co.

Q. 15. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant company.

[fol. 126]

Directors

1917

1918

A. J. Hazeltine
L. R. Freeman
C. B. Ayers
G. H. Dunham
R. W. Stone
J. L. Stone
F. F. Whittekin

Fairfax Harrison*
L. E. Jefferies
C. E. A. McCarthy
E. A. Merrill
J. B. Munson
H. B. Spencer
F. S. Wynn

Officers

1917

1918

President, R. W. Stone.....	President, Fairfax Harrison #.
V. P., C. B. Ayers.....	V. P., L. E. Jefferies #.
Secy., J. L. Stone.....	V. P., H. B. Spencer #.
Treas., A. J. Hazeltine.....	V. P., H. W. Miller #.
Auditor, A. C. Matheson.....	V. P., J. B. Munson #.
Gen. Mgr., T. H. Hayden.....	Secy., F. S. Wynn #.
Gen. F. A., A. C. Matheson.....	Compt., E. H. Kemper #.
Gen. P. F., A. C. Matheson.....	— — — —
Chief Eng., T. H. Hayden.....	— — — —

Q. 16. Name the officers and directors of the Cumberland Railroad and state what relation, if any, each of them bore to defendant company.

[fol. 127]

Directors

1917

1918

D. A. Carpenter
W. P. Chamberlain
Fairfax Harrison*
S. B. Luttrell
G. W. Montgomery

Fairfax Harrison*
S. B. Luttrell
L. D. Smith
H. B. Spencer
F. S. Wynn

Officers

President, Fairfax Harrison #.....	Fairfax Harrison #.
V. P., H. B. Spencer #.....	# L. E. Jefferies & H. B. Spencer #.
Secretary, F. S. Wynn #.....	F. S. Wynn #.
Treasurer, H. C. Ansley #.....	F. S. Wynn #.
Gen. Counsel, A. P. Humphrey #.....	— — — —
Comptroller, A. H. Plant #.....	E. H. Kemper #.
General Manager, E. H. Coapman #.....	— — — —

*Also Director Southern Ry. Co.

‡ Held similar office with Southern Railway Co.

Q. 17. Explain the relationship between the Southern Railway Company (Corporate) and the Southern Railroad (Federal) with regard to income, expenses, taxes, accounting and mileage operated.

A. Corporate Income Statement for 1918, Exhibit C, attached.

Exhibit B sets forth results of operation as reported for account [fol. 128] of Federal Administration, and represents Federal's income for such operation; while Exhibit C reflects compensation to the Southern Railway Company made by the United States Government under the Act of March 21, 1918 and for such compensation indicated on Exhibit C as Standard Return, there is no deduction reflected in the operations under the Federal Administration as shown by Exhibit B.

Southern Railway was under federal operation during 1918, and therefore had no operated mileage.

EXHIBIT A FOR 1917

Mileage Statistics

Owned, Leased, Controlled, and Operated by Southern Railway Co.,
Year Ended June 30, 1917

Owned:

Southern Railway Company.....	4,215.24
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Leased:

Southern Railway-Carolina Division.....	755.12
Virginia & Southwestern Railway.....	188.96
Elberton Southern Railway.....	50.60
Mobile & Birmingham Railroad.....	150.35
Richmond & Mecklenburg Railroad.....	31.30
Georgia & Midland Railroad.....	97.88
North Carolina Midland Railroad.....	53.52
North Carolina Railroad.....	225.95
Atlanta & Charlotte Air Line Railway.....	263.08
Atlantic & Danville Railway.....	277.71
North & South Carolina Railroad.....	3.73
[fol. 129] Lockhart Railroad.....	13.81
Wooldridge-Jellico Coal Co.....	1.75
Memphis-Chattanooga Railway.....	2.83
	<hr/>
	2,116.59

Operated under Agreement:

Southern Railway Company in Mississippi.....	11.40
Trackage Rights.....	517.50

Controlled by Ownership of Stock:

State University Railroad.....	10.20	
Sievern & Knoxville Railroad.....	17.44	
Ensley Southern Railway.....	33.42	
Roswell Railroad.....	12.55	
Cumberland Railway.....	11.21	
Tennessee & Carolina Southern Ry.....	29.89	
Southern Railway in Kentucky.....	127.64	
The Alabama Great Southern Rd.....	312.27	
Atlantic & Yadkin Railway Co.....	163.10	
Ashville & Craggy Mountain Ry.....	4.44	
Blur Ridge Railway Co.....	44.00	
Cumberland Railroad Co.....	12.90	
Carolina & Tennessee Southern Ry. Co.....	13.90	
Danville & Western Ry. Co.....	80.78	
Georgia Southern & Florida Ry. Co.....	402.05	
Hartwell Railway Co.....	10.10	
High Point, Randleman, Ashboro & Southern.	27.98	
Mobile & Ohio Rd. Co.....	1,160.30	
New Orleans & Northeastern R. R. Co.....	203.73	
[fol. 130] Northern Alabama Railway Co....	112.50	
Tallulah Falls Railway Co.....	58.00	
Yadkin Railroad.....	52.23	
		2,900.63
		9,761.36

Exhibit B for 1917 is in words and figures as follows, to-wit (two sheets):

[fol. 131] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

STIPULATION RE EXHIBITS—Filed Aug. 10, 1921

It is agreed by counsel for the parties in the above-named causes that the following original exhibits shall not be copied by the Clerk, but that said exhibits shall be taken from the record in the Woodford Circuit Court and attached to the copy of the record for the Court of Appeals, and when so attached they shall have the same effect as if the Clerk had made copies thereof in the record. The exhibits referred to are the exhibits headed "Income Account year 1914, Income Account year 1915, and Income Account year 1916," all marked Exhibit B., and which are filed with the answer of the defendant in the first named cause; also Income Account June 30, 1917, and Federal Income Account, December 31, 1918, both marked Exhibit B., filed with the answer of the defendant in the last-named cause.

The Clerk will copy this stipulation with the record of the Court of Appeals.

Leslie W. Morris, Hobson & Hobson, for Plaintiff. Wallace & Harriss, Humphrey, Crawford & Middleton, for Defendant.

[File endorsement omitted.]

[fol. 132] Exhibit C is in words and figures as follows, to-wit:

Southern Railway Company

Corporate Income Statement for Year Ended December 31, 1918

Exhibit C

Corporate Income:

Certified Standard Return under Federal Control Act	\$18,653,893.15
Operating Income—Revised Income from Lease of Road	60,176.84
Miscellaneous Rent Income.....	243,333.27
Net Income from Rail Leased.....	41,163.18
Dividend Income.....	1,020,562.30
Income from Funded Securities.....	682,623.15
Income from Unfunded Securities and Accounts..	129,317.94
Miscellaneous Income.....	1,556.74
Total Corporate Income.....	<u>\$20,832,626.57</u>

Deductions:

Rent for Leased Roads.....	\$2,338,822.14
Miscellaneous Rents	31,007.35
Separately Operated Properties.....	5,591.90
Interest on Unfunded Debt.....	42,295.81
Corporate Expenses	187,519.38
War Taxes	574,006.75
Miscellaneous Income Charges.....	89,328.49
Total Deduction of this class.....	<u>\$3,268,571.82</u>

[fol. 133] Total Available Income..... \$17,564,054.75

Interest Accrued on Funded Debt.....	\$10,947,490.00
Interest Accrued on Equipment Obligations.....	681,643.89
Dividend Accrued on Southern Railway—Mobile & Ohio Stock Certificates.....	<u>226,008.00</u>

Total Deductions of this Class..... \$11,855,141.89

Balance of Income Over Charges.....	\$5,807,912.86
Dividend of 5% on Preferred Stock.....	3,000,000.00
Appropriations of Income for Additions & Betterments	58,728.21
Balance Carried to Credit of Profit & Loss..	\$2,650,184.65

In answer to the 17th Interrogatory the following are the facts:

Prior to and since January 1, 1917, a corporation called the Southwestern Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. The Southern Railway Company owned a certain number of shares of the stock of the Southwestern Construction Company, and the Alabama Great Southern Railroad Company owned a certain number of the shares of the stock of the said Southwestern Construction Company. The Southern Railway Company owned a majority of the stock in the Alabama Great Southern Railroad Company. The ownership of the Southern Railway Company and of the Alabama Great Southern Railroad Company in the stock of the Southwestern [fol. 134] Construction Company was less than half of said stock. Since January 1, 1917, the amount of stock in the Southwestern Construction Company owned by the Southern Railway Company and the Alabama Great Southern Railroad Company has been more than half of said stock.

The item "hire of Equipment" is the balance due by the said Southern Railway Company to other railroads on account of the use of the equipment of such other railroads, less any balance due to the Southern Railway Company for the use of its equipment by other railroads.

"Joint Facility Rents" are the amounts due by the Southern Railway Company to other railroads or terminal companies on account of the use of such property as terminal facilities, owned by such other railroads or terminal companies, less any amounts due to the Southern Railway Company for the use of its terminal facilities or other similar property, by other railroads or terminal companies.

In ascertaining the net income of railroads, which income is capitalized in order to ascertain the value of the capital stock of said railroads, it is and has been, during the years in controversy herein, the fixed rule of the assessing authorities of Kentucky to deduct taxes, hire of equipment in debit and joint facility rents in debit.

[fol. 135] Sworn to by Alex. P. Humphrey; jurat omitted in printing.

[fol. 136]

[File endorsement omitted]

IN COUNTY COURT OF WOODFORD COUNTY

[Title omitted]

REPLY—Filed June 28, 1920

Comes the plaintiff, Commonwealth of Kentucky, by Robert Hawkins, Sheriff of Woodford County, and for its reply to paragraphs one and two of the answer of defendant says that this action did not, does not, and will not hereafter affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds. Plaintiff says that no act or authority of the defendant, Director General, or his operation of the railroads of the United States may amend or repeal or impair or affect the right of plaintiff to collect or to proceed to collect the taxes alleged to be due in its original statement herein; according to the Act of Congress in such cases made and provided.

[fol. 137] Plaintiff further says that the net earnings or income of the defendant, according to Kentucky Statutes so made and provided, must include and do necessarily include the net earnings or income of each of the railroads controlled by it. The miles of line produce said income and that when said miles of line form a part of defendant's total system, then the net earnings or income of each of said component parts must be added together to determine the net earnings or income of defendant. Plaintiff therefore denies that the net earnings or income of defendant for the year ending June 30, 1917, was \$25,043,853.67 and avers same was \$45,312,000.00 as alleged in its statement herein; plaintiff further denies that the net earnings or income of defendant for the year ending December 31, 1918 was \$30,438,341.39 and avers same was \$43,865,000.00 as alleged in its statement herein:

For reply to paragraph 3 of defendant's answer plaintiff says that said State Tax Commission may have deducted taxes in fixing the net earnings or income of railroads for each of said two years. Plaintiff says that the action of said Commission in deducting taxes to determine net earnings or income was based on an error of law, in that no natural person is or ever was allowed any deduction for taxes paid, in computing the value of intangible property; and it is further provided by the Constitution of this Commonwealth that all corporate property, shall pay the same rate of taxation paid by individual property. The deduction of taxes paid, by said Commission results in corporate property paying taxes at a less rate than paid by individual property.

[fol. 138] Plaintiff further says that the action of said commission in capitalizing net earnings or income at 7% was based on an error of law and says that 6% is the true lawful rate for said capitalization.

Plaintiff denies that for each of any of the taxing years mentioned in the statement, local or any assessors or assessor, or other or any

assessing officers of the State of Kentucky have either habitually, or intentionally or systematically or generally assessed the property of individuals or individual or corporations or corporation within their sphere of duty at 60 per cent or any other per cent less than 70 per cent of its fair cash value estimated at the price which it would bring at a fair and voluntary sale. Denies that said alleged assessment has been a matter of public or any notoriety in the State. Plaintiff admits that said Commission equalized at seventy per cent to conform with the ruling of the Supreme Court of the United States. Plaintiff denies that it would be a violation of the Constitution of Kentucky or of the United States to make an assessment on a basis of seventy per cent.

And for further reply to paragraph four of defendant's answer, plaintiff denies that in none of said periods did defendant have any tangible property in this State, denies that defendant has no intangible property in this State, during said periods. Plaintiff denies that the four or any lines of railroads within Kentucky as set out in its statement herein have been assessed against defendant. An assessment has been made of said four lines, but made no reports which did not show the defendant's property in Kentucky. Plaintiff [fol. 139] admits that defendant had double track and certain terminals outside of Kentucky and avers that on account thereof defendant may be entitled to a further equalization not exceeding five per cent, making an admitted equalization of 70% less 5% or 65%.

Plaintiff denies that this action is an effort to bring into Kentucky for the purpose of taxation, property not in Kentucky, or value or values appertaining to property not in Kentucky or earnings derived from property not in Kentucky; denies this action is in violation of the Constitution of Kentucky or of the United States; denies that a judgment for plaintiff herein is in violation of the Constitution of Kentucky or the United States.

Wherefore plaintiff prays as in its statement.

Hazlrigg & Hazlrigg, Leslie W. Morris, W. D. Jesse, Hobson & Hobson, Attys. for Plaintiff.

[File endorsement omitted.]

[fol.140] IN COUNTY COURT OF WOODFORD COUNTY,
COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant,
and
COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, etc., Defendants.

JUDGMENT—Sept. 23, 1920

Came the parties and filed stipulations and by consent these two cases are heard together and the case being submitted to the Court and the Court being advised it is adjudged by the Court that the plaintiff's petitions be dismissed and that plaintiff take nothing thereby to all of which plaintiff excepts and prays an Appeal which is granted.

Said Judgment is endorsed as follows, to-wit: Entered in Order Book No. 4, at page 594.

[fol. 141] Thereafter and on the 29th day of September, 1920, the following Copy of the Judgement of the Woodford County Court was filed in the Woodford Circuit Court:

[Ohitted; printed on page 140 ante]

[fol. 142] IN CIRCUIT COURT OF WOODFORD COUNTY
COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant,
and
COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, etc., Defendants.

JUDGMENT AND APPEAL ORDER—March 12, 1921

This day came the parties to the above proceedings, and filed [fol. 143] stipulations in each case, and by consent these two cases are heard together; and said cases being submitted to the Court on

the pleadings, exhibits and stipulations now filed, and the Court being advised, it is adjudged by the Court that the plaintiff's petitions be dismissed in each of said cases, and that plaintiff take nothing in either, to all of which, and as applying to each case, the plaintiff objects and excepts and prays an Appeal to the Court of Appeals, which is granted.

The printed reports to the stockholders and the reports to the Auditor, filed in the record, are not to be copied in the transcript, but will be filed with the Transcript with the Clerk of the Court of Appeals; and the stipulations used in the County Court and not in the Circuit Court are not to be copied in the Transcript.

The defendants, in each of said cases shall recover of R. S. Hawkins, as Sheriff of Woodford County, their costs in said causes expended.

Approved: J. P. Hobson, for Plff.; Chas. M. Harris, for Deft.

[fol. 144] IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and WALKER D. HINES, Director
General of Railroads, Defendants

STIPULATION OF FACTS—Filed March 12, 1921

The parties hereto by their respective counsel, hereby stipulate the following facts as applicable to this case for the purposes of a trial in the Circuit Court.

1. The Southern Railway Company of Virginia owns to the extent and as set out in the answer to the petition and the answers to the interrogatories herein the stock of the following four railroads, which do own property and operate in Kentucky, viz: Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company, Mobile & Ohio Railroad Company.

2. When the Southern Railway Company in Kentucky acquired the property of the Louisville Southern Railway Company in 1894, it also acquired the following equipment, viz:

Steam locomotives.....	25
Box Cars.....	609
Flat cars.....	47
Stock Cars.....	70
Caboose cars.....	12
All classes of freight cars.....	738
[fol. 145] Coaches.....	15
Combination Passenger Cars.....	3
Baggage & Express Cars.....	5
All classes of Passenger Cars.....	23
Derrick Cars.....	1
Other Company Service Cars.....	7
All classes of company service cars.....	8
All classes of cars in service.....	769

Since that time the above named equipment has been used by the Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway Company in Kentucky, and portions by the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment was used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia was without charge to that Company, in consideration of that Company's furnishing to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway Company in Kentucky.

When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway Company in Kentucky; so that, for every period of time from 1894 [fol. 146] up to and including the present time, the Southern Railway Company in Kentucky owns the same number of locomotives, freight and passengers cars, etc., that it did in 1894, and has reported each year and tax-paid each year on the same description and value of equipment as on hand September 17, 1894.

The Southern Railway Company in Kentucky has bought no equipment since 1894.

3. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in Stipulation 2, it has leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of various other railroad companies, and has done this under the usual traffic arrangement obtaining among railroads, and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia, and other Railroads, the regular charges for such hire of equipment.

4. No railroad operates entirely with its own rolling stock; that all such rolling stock equipment is in more or less common use among the different railroads, and for such use each railroad pays to the owning railroad the regular standard prices.

5. Except for the ownership of stock of the four railroads specified in Stipulation 1, and except for the equipment detailed in Stipulation 3, the Southern Railway Company of Virginia owns otherwise no property or lease of any kind in the State of Kentucky, and transacts no business in the State of Kentucky, except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, it owns or operates said lines of rail- [fol. 147] road or any of them within the meaning of the Kentucky Statutes, and this question is submitted to the Court on all the facts.

6. The printed pamphlets filed June 28, 1920, marked "Annual Reports of the Southern Railway Company" for the years in question, are the reports to the stockholders made and printed by the corporation and are correct copies of said reports. The plaintiff read on the trial from said report for 1914, pages 17, 69, 67; for 1915, pages 15, 68, 69; for 1916, pages 55, 56; for 1917, pages 51, 53; for 1918, pages 19, 21, and no other pages were read on the trial.

7. The Southern Railway Company in Kentucky was incorporated under the laws of the State of Kentucky on August 17, 1894. A copy of the articles of incorporation, hereto attached, is a true and correct copy of such articles of incorporation.

The line of railroad owned and operated by the Southern Railway Company in Kentucky extends from Louisville, Kentucky, in an easterly direction to Danville, Kentucky passing through Shelbyville, Lawrenceburg and Harrodsburg, Kentucky. There are branch lines extending from Harrodsburg to Burgin, Kentucky, from Lawrenceburg to Lexington, Kentucky, and from Versailles to Georgetown, Kentucky.

At Danville, Burgin, Lexington and Georgetown, the lines of the Southern Railway Company in Kentucky connect with the line of the Cincinnati, New Orleans & Texas Pacific Railway Company's road from Cincinnati, Ohio, to Chattanooga, Tennessee. At each [fol. 148] of such points all of the terminal facilities used by the Southern Railway Company in Kentucky are the property of the Cincinnati, New Orleans & Texas Pacific Railway Company. At Louisville, Kentucky, the passenger depot belonging to the Illinois Central Railroad Company is used.

At Louisville, Kentucky, the Southern Railway Company in Kentucky uses the passenger depot belonging to the Illinois Central Railroad Company, and the shops, round-houses and freight yards belonging to the Kentucky & Indiana Terminal Railroad Company. The only terminal facility owned in Louisville by the Southern Railway Company in Kentucky is its freight house.

The Southern Railway Company in Kentucky owns no double track lines and the only terminal facilities owned by it are inexpensive ones situated in the small towns along the route.

What is now the Southern Railway Company in Kentucky was originally chartered by the State of Kentucky in 1868 under the name of the "Louisville, Harrodsburg and Virginian Railroad Com-

pany" (Acts 1867-1868, Vol. 2, p. 553). On 1884, the charter was amended and the name changed to that of "Louisville Southern Railroad Company" (Acts 1883-1884, Vol. 2, page 665). The City of Louisville subscribed \$100,000 of bonds to aid in the construction of the road (Wooley v. Louisville Southern, 93 Ky. 223, 19 S. W. 595).

In 1888, a line had been built from Louisville, Kentucky to Burgin, Kentucky.

On December 10, 1888, the Louisville Southern Railroad Company [fol. 149] leased all of its property to the Monon Railroad. After this lease, a branch line was constructed from Lawrenceburg, Kentucky, to Lexington, Kentucky.

In 1884, there was chartered by the legislature the "Versailles & Midway Railway Company" (Acts 1883-1884, Vol. 2, p. 9), and in 1885, the line from Versailles, Kentucky, to Midway, Kentucky, was constructed by that Company.

In 1889, the Louisville Southern Railroad Company acquired the stock of the Versailles & Midway Railway Company and the line from Midway, Kentucky, to Georgetown, Kentucky, was completed, and the three roads were consolidated.

In 1890, the Louisville Southern Railroad Company leased all of its property to the East Tennessee, Virginia & Georgia Railway Company, and on July 1, 1893, default having been made in the payment of interest on bonds, the property of the Louisville Southern Railroad Company was foreclosed in the Circuit Court of the United States for the District of Kentucky and the property sold on August 16, 1894, to Charles H. Coster. Thereafter, on August 17, 1894, there was incorporated the Southern Railway Company in Kentucky to take over the lines, franchises, etc., of the Louisville Southern Railroad Company, and that corporation has since continued to own and operate what was formerly the Louisville Southern Railroad Company.

The Southern Railway Company of Virginia was incorporated February 20, 1894. Neither it nor its predecessors had any stock [fol. 150] in or control of any of the predecessors of the Southern Railway Company in Kentucky.

8. The Cumberland Railroad Company was incorporated under the laws of the State of Kentucky on ———, ———. It owns and operates a line of railroad beginning at Artemus, Kentucky, on the line of the Louisville & Nashville Railroad Company and running in a southeasterly direction 12.9 miles, all in Knox County, Kentucky. It connects with no other railroad except the Louisville & Nashville Railroad Company at Artemus, Kentucky.

9. The Cumberland Railway Company was incorporated under the laws of the State of Tennessee, and owns and operates a line of railroad 1.74 miles long in Bell County, Kentucky, and extending from a point in Bell County, Kentucky, to the tracks of the line of railroad owned and operated jointly by the Louisville & Nashville Railroad Company and the Southern Railway Company outside of the State of Kentucky.

10. The Mobile & Ohio Railroad Company was chartered by the States of Alabama, Mississippi and Tennessee in 1848 (Acts of Alabama, 1848, p. 225; Laws of Mississippi, 1848, p. 83; Acts of Tennessee, 1847-1848, p. 177) and in 1848, the State of Kentucky passed an act "to authorize the Mobile & Ohio Railroad Company to extend their railroad from the southern boundary line of the State of Kentucky to the Mississippi or Ohio Rivers" (Acts of Kentucky, 1847-1848, p. 344). The States of Alabama and Mississippi (1850 and 1852) gave to the Mobile & Ohio Railroad Company a total of the 1,156,658.92 acres of land for the purpose of [fol. 151] assisting in the financing of that road. On June 30, 1901, the Mobile & Ohio Railroad Company still held 303,102.22 acres of this land. The construction of this road was commenced in March, 1852, and completed in December, 1857.

In January, 1901, the Southern Railway Company of Virginia offered to exchange its own securities for enough of the stock and securities of the Mobile & Ohio Railroad Company to give it a majority holding in that Company. By April, 1901, a majority of the stock and securities of the Mobile & Ohio Railroad Company was thus secured and has been held since by the Southern Railway Company of Virginia.

The road of the Mobile & Ohio Railroad Company extends from St. Louis, Missouri, to Mobile, Alabama. It only passes through one corner of the State of Kentucky, and touches no large cities in the State of Kentucky. Its total mileage in the State of Kentucky during the years involved was only 38.693 miles.

11. There are no double-tracks or extensive or expensive terminals or shops in Kentucky belonging to either the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company or the Mobile & Ohio Railroad Company.

12. The Southern Railway Company of Virginia owned terminals, shops and double tracks outside of the State of Kentucky of the value of:

1917:

Double track.....	\$53,918,513.72
Terminals	64,396,142.17
Total	\$118,314,655.89

[fol. 152] 1918:

Double track	\$58,800,035.50
Terminals	70,593,076.10
Total	\$129,393,111.60

13. The Alabama Great Southern Railway Company owned during the years in controversy terminals of the value of \$45,478.12, double track,

1917	\$2,098,284.71
1918	2,603,134.71

14. The net income of the Southern Railway Company of Virginia, including that of the railroads owned, operated, leased or controlled by it for the years in controversy was:

1917	\$31,806,408.49
1918	32,969,380.58

The above figures do not include sums paid for taxes which were as follows:

1917	\$4,668,758.78
1918	5,132,427.18

If the Court is of opinion that taxes are not deductible in ascertaining net income, the above sums are to be added.

15. The four railroads operating in Kentucky had a combined mileage during the years in controversy as follows:

1917, 1918:

Southern Railway Company in Kentucky.....	127.628
Mobile & Ohio Railroad Company.....	38.693
Cumberland Railroad Company	12.90
Cumberland Railway Company	1.74
	<hr/>
	180.961
Trackage rights over other r. r.....	38.919
	<hr/>
Total mileage	219.88

[fol. 153] 16. The Southern Railway Company of Virginia, during the years involved, owned, operated, leased and controlled the following mileage:

1917	9,761.33 miles
1918	9,601.83 miles

17. During each of the years involved, the Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company and the Mobile & Ohio Railroad Company, by their respective officers, or during Federal Control by the officers of the Director General, filed with the State Railroad Commission, State Board of Valuation and Assessment, and the Tax Commission of Kentucky full reports showing the result of all of the operations, etc., of the respective road as required by statute, and each company paid the full tax assessed on its tangible and intangible property.

18. For the years 1914, 1915 and 1916, the property of all railroads in the State of Kentucky was equalized at sixty per cent of its value.

19. For the years 1917 and 1918, the property of all railroads in the State of Kentucky was equalized at seventy per cents of its value.

20. In its report to the Kentucky Railroad Commission for each of the years in question the following question and answer thereto appears in the reports made by the Southern Railway Company in Kentucky:

"2. Did any corporation or corporations, transportation or other, hold control over the respondent at the close of the year?
[fol. 154] "And. This company is advised that the Southern Railway Company controls this company through the ownership of its entire Capital Stock."

Substantially the same answers were made by the Cumberland Railroad Company and Cumberland Railway Company.

The Mobile & Ohio Railroad Company reported substantially the same, except that the control was affected by the ownership of a large majority of its capital stock.

21. The incorporators of the Southern Railway Company in Kentucky were: Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. Ewen, William H. Baldwin, Jr. Samuel Spencer was the President of the defendant, Southern Railway Company. The money paid for the property was furnished by the defendant and it caused the organization of the corporation.

22. At all of the stations of the Southern Railway Company in Kentucky the bulletin boards have at the head of them in large capital letters these words: "Southern Railway System." The same sign is on the window of the office building in Louisville and over the door are these words: "Southern Railway Company in Kentucky, Incorporated."

The Treasurer's Office of the Southern Railway Company in Kentucky is kept in Washington in the same building and by the same men as the Southern Railway Company in Virginia.

[fol. 155] 23. For each of the years involved, the amount paid by all of the railroads in the State of Kentucky for taxes was deducted by the Board of Valuation and Assessment or Tax Commission from the Income of such railroads before the said income was capitalized for the purpose of arriving at the franchise tax.

Hazlerigg & Hazlerigg, Leslie W. Morris, Hobson & Hobson, W. D. Jesse, Attorneys for Plaintiff. Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendants.

Southern Railway Company in Kentucky

Articles of Incorporation, August 17th, 1894

We, the undersigned, to-wit: Charles H. Coster, a purchasing committee, hereinafter called the Purchaser, Who did purchase the railroad and other property of the Louisville Southern Railroad Company at a sale thereof held in the City of Louisville, Kentucky, on the 16th day of August, 1894, under a decree of foreclosure and sale entered on the 11th day of June, 1894, and amended June 21, 1894, in a certain suit in Equity pending in the Circuit Court of the United States of America for the District of Kentucky, wherein [fol. 156] the Central Trust Company of New York and others were complainants and the Louisville Southern Railroad Company, a corporation created by and existing under the laws of the State of Kentucky, was defendant, in which suit it was sought to foreclose the mortgage dated the 1st day of July, in the year 1890, and upon or about that day duly executed, acknowledged and delivered by the said Louisville Southern Railroad Company to said Central Trust Company of New York, and in which suit it was undertaken to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said Louisville Southern Railroad Company, and the said purchasing Committee having at the time of said purchase declared, and the said Court having subsequently ordered and decreed, that the said sale should be for the benefit of a corporation thereafter to be formed under the laws of Kentucky by the name of the "Southern Railway Company in Kentucky," and the said purchasing Committee having paid for the said railroad property sold under the said judgment decree the sum of one million dollars (\$1,000,000), of which twenty thousand dollars (\$20,000) was paid in cash to the Special Master making the sale, and the remainder thereof, to-wit, nine hundred and eighty thousand dollars (\$980,000) has been paid by delivering to the Special Master, for proper endorsement thereon of partial payment bonds of the Louisville Southern Railroad Company, secured by said mortgage, to the amount of four million two hundred ninety-nine thousand five hundred dollars (\$4,299,500), and the said Court having [fol. 157] ordered and decreed the Special Master, Edmund T. Halsey, as further evidence of such sale and purchase, to execute and deliver a deed and conveyance to the said Southern Railway Company in Kentucky, accepted as purchaser in said proceedings, of all of the railroad property described in said judgment decree, to-wit:

All and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or mixed, embraced or included in the said decree of sale and the sale pursuant thereto, that is to say:

All and singular the railroad of the said Louisville Southern Railroad Company, beginning at a point on Magnolia Avenue, between Eleventh and Twelfth streets, in the city of Louisville, and extending thence through the Counties of Jefferson, Shelby, Anderson and Mercer, via Shelbyville, Lawrenceburg and Harrodsburg, to Burgin,

in Mercer County, on the Cincinnati Southern Railroad, and extending from Lawrenceburg through Versailles in Woodford County to Lexington in Fayette County, and also to Georgetown in Scott County, including all rights of way, roadbed, rails, bridges, railroad tracks, switches, side tracks, turntables, lands, depots, station houses, round houses, machine shops, buildings and structures of every sort, with all other things which are part of, connected with or appurtenant to said railroad as above described in all locomotives engines, tenders, cars, carriages, tools, machinery, rolling stock and equipment; also the full benefit of certain contracts between the Louisville Southern [fol. 158] Railroad Company and the Kentucky and Indiana Bridge Company, and the Newport News and Mississippi Valley Railroad Company mentioned in said decree, together with all rights and privileges existing thereunder for and during the full term thereof; also certain depot grounds and buildings at Thirteenth and High Streets, and the eight acre tract adjoining the Kentucky and Indiana Bridge Company's yards described in said decree; also, all property franchises, rights, powers, privileges and immunities belonging or appurtenant to said Louisville Southern Railroad Company, and all tools, incomes, issues and profits arising out of or to be derived from the above-described mortgaged premises, and all the right, title, interest and estate, either legal or equitable, of the Louisville Southern Railroad Company in and to said mortgaged premises excepting, however, any extension of said railroad beyond either of the terminal points herein mentioned, to-wit, Louisville, Burgin, Lexington and Georgetown, and any branch or branches constructed from said railroad, as the same existed at the date of the mortgage mentioned in said decree, to-wit, July 1, 1890, and all rolling stock and equipment expressly purchased by reason and for the use of such extension of such branch or branches.

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 11th of June, 1894, to which reference is hereby made.

Together with all the corporate rights, privileges, immunities and franchises of said Louisville Southern Railroad Company, and all the tolls, fares, freights, rents, incomes, issues and profits of said railroad, and all interests and claims and demands of every nature and [fol. 159] description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold at any time owned or acquired by and now in the possession of, said Louisville Southern Railroad Company, or Samuel Spencer and Henry Fink, or either of them, and Receivers thereof.

And we, whose names are also hereto subscribed, to-wit: Samuel Spencer, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., hereinafter called Associates, whom such Purchaser has associated with him in this organization of a new corporation pursuant to the laws of Kentucky.

Do hereby join in executing these Articles of Incorporation, and do hereby certify, specify, and declare that we have associated to form a

corporation for the purpose of purchasing, owning, constructing, operating and maintaining the railroad hereinbefore described; and we do further certify:

First. The name of the Corporation shall be Southern Railway Company in Kentucky.

Second. The name of the City and County in which its principal office or place of business is to be located is the City of Louisville, in the County of Jefferson.

[fol. 160] Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on is that of owning, operating and maintaining the railroad above described, with such extensions and branches thereof as may from time to time be constructed or acquired in accordance with law.

Fourth. The amount of its capital stock is one million dollars (1,000,000) and the number of shares into which the same shall be divided is ten thousand shares of the par value of one hundred dollars (\$100) each. All such capital stock having been issued to such purchaser and associates as fully-paid stock in part consideration of the transfer to the corporation hereby formed of the property so sold as aforesaid.

Fifth. The name and place of residence of each of its stockholders is as follows: Samuel Spencer, New York, N. Y.; Charles H. Coster, New York, N. Y.; Alexander B. Andrews, Raleigh, N. C.; Francis Lynde Stetson, New York, N. Y.; William A. C. Ewen, Dobbs Ferry, N. Y.; Thomas W. Bullitt, Louisville, Ky.; William H. Baldwin, Jr., Washington, D. C.

Sixth. The time when said corporation is to commence is the date of the filing of these articles, and it is to continue in perpetuity.

Seventh. The affairs of the corporation are to be conducted by five directors, who shall hold office until the first meeting of the stock-[fol. 161] holders of the company to be held; and the names of the first Board of Directors shall be: Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, William H. Baldwin, Jr. The first annual election of directors shall be held at Louisville on the First Monday of August, 1895.

Eighth. The highest amount of indebtedness or liability which the corporation may at any time incur is ten million dollars (\$10,000,000).

Ninth. The private property of the stockholders is not subject, under any circumstances, to the payment of the debts of the corporation.

Tenth. The place from and to which, and the name of each county into or through which the said railroad is now constructed and is intended to be operated, are hereinbefore truly set forth. Its length, as near as may be, is one hundred and thirty and five-tenths (130.5) miles.

In witness whereof, we have executed, signed and acknowledged these articles this seventeenth day of August, 1894.

Witness: ———, Purchaser. ———, Associates.

[fols. 162 & 163] STATE OF ———,
County of ———, ss:

I, ———, do hereby certify that the foregoing instrument in writing, or Articles of Incorporation, were this day produced to me by the parties and were severally acknowledged by the said Samuel Spencer, Charles H. Coster, Alexander B. Andrews, Francis Lynde Stetson, William A. C. Ewen, Thomas W. Bullitt, and William H. Baldwin, Jr., to be their act and deed.

My commission expires ———, ———.

Given under my hand and seal of office, this the — August, 1894. ———.

[File endorsement omitted.]

Thereafter and on the 12th day of March, 1921, the following judgment was entered of record, to-wit:

[Omitted; printed side page 142 ante]

[fol. 164] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

The Clerk is directed to copy on this appeal to the Court of Appeals the following parts of the record in each case: The statement and interrogatories, the amended statements, the answer and answers to interrogatories, the reply, the judgment and orders of the County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court.

L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Appellants.

[fol. 165] [File endorsement omitted.]

[fol. 166] IN CIRCUIT COURT OF WOODFORD COUNTY

CLERK'S CERTIFICATE

I, C. A. Witt, Clerk of the Woodford Circuit Court do hereby certify that the first ninety-six foregoing typewritten pages are true, accurate and complete copy of the state and interrogatories, answer and answers to interrogatories, reply, judgment and orders of the County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court; that the exhibits marked "B" for 1914, "B" for 1915 and "B" for 1916, filed with and made a part of the defendant's answer are the original exhibits filed in the answer of the defendant in the case of the Commonwealth of Kentucky on relation &c. vs. Southern Railway Company, and which original exhibits are filed in this Transcript under stipulation found on page 57-a of the Transcript of Record; that the next eighty-eight typewritten pages is a true, accurate and complete copy of the statement and interrogatories, the amended statements, the answer and answers to interrogatories, the reply, the judgment and orders of County Court, the judgment of the Circuit Court and the stipulations filed in the Circuit Court; that the exhibits "B" Income Account June 30, 1917, and Federal Income Account December 31, 1918, filed with and made a part of defendants' answer, are the original Exhibits filed in the answer of the defendants in the case of Commonwealth of Kentucky on Relation &c. vs. Southern Railway Company and Walker D. Hines, Director General and which original exhibits are filed with this Transcript of Record under stipulation found on page 49-a of Transcript of record.

[fol. 167] I further certify that the Printed Reports to the Stockholders and the Reports to the Auditor, hereto attached, are the original Reports filed in the record and which original Reports were ordered by the Judgment in the Circuit Court to be filed in the Court of Appeals.

I further certify that the foregoing transcript is a true and complete copy of the record in said cases ordered to be copied by said schedule and said stipulation.

Given under my hand as clerk of the Woodford Circuit Court, this the 12th day of August, 1921.

C. A. Witt, Clerk, Woodford Circuit Court.

EXHIBIT IN EVIDENCE

Page 17 of the Twentieth Annual Report of the Southern Railway Company, Year Ended June 30th, 1914

Report of the Vice-President and General Manager

Mr. Fairfax Harrison, President, Washington, D. C.

Washington, D. C., Sept. 8th, 1914.

DEAR SIR:

I submit herewith a report of the operations of Southern Railway Company for the year ended June 30, 1914:

Miles of Road Operated June 30th, 1914

Location of lines	Owued	Leased or other- wise controlled	Operated under trackage rights	Total miles operated
District of Columbia.....	550.87	.....	3.40	3.40
Virginia.....	591.50	276.84	40.15	867.86
North Carolina.....	356.86	754.97	120.68	1467.15
South Carolina.....	653.02	765.17	5.75	1127.78
Georgia.....	.....	256.89	144.71	1054.62
Florida.....	.....	5.99	35.82	41.81
Alabama.....	823.61	183.77	31.44	1038.82
Mississippi.....	71.92	11.40	19.58	102.90
Tennessee.....	663.14	36.17	31.33	730.64
Kentucky.....	127.75	2.09	42.73	172.57
Indiana.....	236.17	.....	3.33	239.50
Illinois.....	157.11	.....	5.78	162.89
Miles Operated June 30th, 1914.....	4231.95	2293.29	484.79	7009.94
Miles Operated June 30th, 1913.....	4239.05	2323.19	474.29	7036.53
Increase.....	.....	.....	10.41	.....
Decrease.....	7.10	20.90	.....	26.59

[fol. 169] In addition to the milcage operated by it, the Company owns the following lines which are leased to and operated by other companies:

	Miles
Orange Va., to Gordonsville, Va. Chesapeake & Ohio Ry. Co. . .	9.40
Alexandria, Va. to Bluemont, Va. Washington & Old Dominion Railway	54.55
Anderson S. C. to Belton, S. C.—Blue Ridge Railway Co.	9.98
Bulls Gap, Tenn., to Rogersville, Tenn. Virginia & Southwestern Railway Company	14.10
Gretna, Va., to Pittsville, Va.—Franklin & Pittsylvania Railroad Co.	7.10

Total mileage Leased to and operated by other companies. 95.13

The Decrease in Miles Operated was occasioned by:

	Miles
Surrender of the line Pittsville, Va. to Rocky Mount, Va. on May 1st, 1914, to its owner, Franklin & Pittsylvania Railroad Company	29.90
Lease as of May 1st, 1914, of this Company's line from Gretna, Va., to Pittsville, Va. to Franklin & Pittsylvania Railroad Company	7.10
	<hr/> 37.00

Trackage Rights Acquired:

From the Louisville & Nashville Railroad Company, over the Stony Fork and Hignite Branch, in Kentucky	10.41
Net Decrease in Miles Operated	26.59

The average mileage of lines operated during the year ended June 30th, 1914, was 7,032.97, as compared with 7,035.61 for the preceding year, a decrease of 2.64 miles, or 0.04 per cent.

The average mileage of lines maintained during the year was 6,556.08, as compared with 6,561.26 miles during the preceding year, a decrease of 5.18 miles, or 0.08 per cent.

[fol. 170] On June 30th, 1914, the mileage of double-track on lines owned, leased or otherwise controlled and operated by the Company including third and fourth tracks, was 402.64 miles, as compared with 358.39 miles on June 30th, 1913, an increase of 17.25 miles.

[fol. 171] Page 67 of the Twentieth Annal Report of the Southern Railway Company, Year Ended June 30th, 1914

Miles of Road Operated June 30th, 1914

Lines Owned

Seminary Junction Va. to Greensboro, N. C.	278.58
Neapolis, Va. to West Point, Va.	179.00

Miles of Road Operated June 30th, 1914—Continued

Charlotte, N. C. to Augusta, Ga.....	190.49
Columbia, S. C. to Greenville, S. C.....	143.52
Salisbury, N. D. to Morristown, Tenn.....	231.37
Bristol, Tenn. to Chattanooga, Tenn.....	241.55
Stevenson, Ala. to Memphis, Tenn.....	271.75
Tuscumbia, Ala. to Sweetwater, Ala.....	8.30
Ooltewah Junction, Tenn. to Brunswick, Ga.....	410.09
Moscow, Tenn. to Somerville, Tenn.....	13.10
Austell, Ga. to Mississippi State Line.....	260.70
Okolona, Miss. to Calhoun City, Miss.....	37.82
Atlanta Junction, Ga. to York, Ala.....	270.50
Manassas, Va. to Harrisonburg, Va.....	112.89
Calverton Va. to Warrenton, Va.....	8.90
Leftwich Junction, Va. to Durmid Junction, Va.....	5.44
South Richmond, Va. to Rockets, Va.....	1.00
Clarksville, Va. to Durham, N. C.....	55.10
Oxford, N. C. to Henderson, N. C.....	12.75
Goldsboro, N. C. Cut-Off.....	1.55
Pomona, N. C. to North Wilkesboro, N. C.....	100.15
Murphy Junction, N. C. to Murphy, N. C.....	122.50
Charlotte, N. C. to Taylorsville, N. C.....	67.65
North Charlotte, N. C. —Cut Off.....	1.20
Hodges, S. C. to Abbeville, S. C.....	11.58
Aiken, S. C. to Edgefield, S. C.....	23.57
Embreeville Junction, Tenn. to Embreeville, Tenn.....	13.00
Clinton, Tenn. to Harriman, Tenn.....	30.44
Coster, Tenn. to Cumberland Gap, Tenn.....	63.56
Knoxville, Tenn. to Jellico, Tenn.....	65.30
Chattanooga, Tenn. connection with C. N. O. & T. P. R. R. Co.....	49
Coal Creek, Tenn. to Briceville, Tenn.....	3.10
La Follette, Tenn. to Vasper, Tenn.....	11.30
Near Newcomb, Tenn. Spur to Woolridge-Jellico Coal Co... ..	2.08
Morristown, Tenn. to Corryton, Tenn.....	39.60
Knoxville, Tenn. to Walland, Tenn.....	26.21
Cleveland, Tenn. to Cohutta, Ga.....	14.80
North Rome, Ga. to Attalla, Ala.....	61.30
Atlanta, Ga. to Fort Valley, Ga.....	102.30
Howell, Ga. to Armour, Ga.....	3.30
Cochran, Ga. to Hawkinsville, Ga.....	10.28
Villa Rica, Ga. to Mines of Virginia-Carolina Chemical Co.	2.92
Marion Junction, Ala. to Akron, Ala.....	53.00
Wilton, Ala. to Valley Creek Junction, Ala.....	37.28
Gurnee Junction, Ala. to Blocton, Ala.....	14.30
Woodlawn, Ala. to end of Belt Road, Bessemer, Ala.....	20.50
North Birmingham, Ala. to Coalburg, Ala.....	6.40
Cardiff, Ala. to Brazil Mines, Ala.....	1.60
Jefferson, Ala. to Blossburg, Ala.....	1.91
[fol. 172] Patton Junction, Ala. to Patton, Ala.....	1.10

Miles of Road Operated June 30th, 1914—Continued

Littleton, Ala. to Porter, Ala.....	7.70
Henry Ellen, Ala. Spur to Mines of Tennessee Coal, Iron & Railroad Company.....	1.02
Spring Garden, Ala. to Mines of Alabama & Georgia Iron Co.	4.49
Lula, Ga. to Athens, Ga.....	38.93
Ardella, Ala. to Hansell, Ala.....	2.90
Seymour, Ala. Piper Spur.....	3.91
Spur, near Aden, Ala. to mines of the Galloway Coal Co. . .	.59
Spur near Oden, Ala. to Mines of the Bessemer Coal, Iron & Land Company.....	5.60
Pimmers Point, Va. to connection with Atlantic Coast Line Ry. ....	.66
Louisville, Ky. to Cincinnati Southern Junction, Ky., (Southern Railway in Kentucky).....	83.47
Lawrence, Ky. to Lexington, Ky. (Southern Railway in Kentucky)	23.72
Norton, Ky. to Burgin, Ky. (Southern Railway in Ken- tucky)	3.82
Versailles, Ky. to Georgetown, Ky. (Southern Railway in Kentucky)	16.74
Venice & Carondelet Belt, East St. Louis, Ill.....	6.87
Connection with Chicago & Alton, Ry. to North Incline Ter- minal East St. Louis, Ill.....	2.40
Belleville Junction, Ill. to Belleville, Ill.....	1.14
East St. Louis, Ill. to Indiana State Line.....	146.71
Illinois State Line to New Albany, Ind. (Southern Ry. Ind.)	118.28
Rockport Junction, Ind. to Rockport, Ind. (Southern Ry. Ind.)	16.15
Jasper, Ind. to Evansville, Ind. (Southern Ry. Ind.).....	54.22
Lincoln City, Ind. to Carmelton, Ind. (Southern Ry. Ind.)	22.72
Jasper, Ind. to French Lick, Ind. (Southern Ry. Ind.)	24.80
Forward	4,231.95

[fol. 173] Page 69 the Twentieth Annual Report of the Southern
Railway Company, Year Ended June 30th, 1914

Table 27—Miles of Road Operated June 30th, 1914

Brought forward 6,525.24

Lines Operated under Trackage Rights:

Atlanta Terminal Company—Entrance Union Passenger Station Atlanta, Ga. ....	.50
Baltimore & Ohio Ry. Co.—Entrance to Passenger Station Harrisonburg, Va. ....	.50

Miles of Road Operated June 30th, 1914—Continued

Phila. Balto. & Washington, D. C., to South end Potomac Bridge, Va.	2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway: South end Potomac Bridge, Va. to Seminary Junction, Va.	5.70

Central of Georgia Railway:

Central Junction Ga. to West Broad Street Savannah, Ga.	3.37
Fort Valley Ga. ....	.10
	3.47

Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga. ....	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga. ....	.25
Western & Atlantic Railroad—W. & A. Crossing Ga. to Dalton, Ga. ....	.20

Alabama Great Southern Railroad:

Entrance to Station, Attalla, Ala.	3.44
Woodlawn, Ala., to Birmingham, Ala.	2.11
York, Ala., to Meridian, Miss.	27.16
Central Passenger Station to Louisa Street, Chattanooga, Tenn. ....	.40
	33.11

Louisville & Nashville Railroad:

L. & N. Junction to Union Passenger Station, Florence, Ala. ....	.20
Cumberland Gap, Tenn., to Middlesboro, Ky. (Southern Ry. in Ky.)	4.41
Stony Fork and Hignite Branch, Ky.	10.41
Middlesboro Belt and Bennetts Fork Branch, Ky. . .	9.81
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22
	34.05

Miles of Road Operated June 30th, 1914—Continued

Atlantic Coast Line Railroad:

Pinners Point, Va., to Selma, N. C.	154.38
Hardeeville, S. C., to Central Junction, Ga.	16.70
Four Mile Crossing, Ga., to Union Passenger Station, Brunswick, Ga.	3.10
Central Junction, Ga., to Jacksonville Terminal Prop- erty line, Jacksonville, Fla.	152.08
Entrance to Union Passenger Station, Savannah, Ga..	.72
Central Junction, Ga., to end of double track .....	.09
	<hr/>
	327.07
	<hr/>

[fol. 174] Northern Alabama Railway—N. A. Junction to Sheffield, Ala.	3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss. ....	.65
Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn., to Stevenson, Ala.	38.50
Jackson Terminal Company—Entrance to Union Passenger Station, Jacksonville, Fla.	1.47
Memphis Union Station Company—Entrance to Union Pas- senger Station, Memphis, Tenn. ....	.55
Chattanooga Station Company—Entrance to Union Pas- senger Station, Chattanooga, Tenn. ....	.64
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.	4.48
St. Louis Terminal R. R. Association—St. Louis, Mo., to Relay Junction, East St. Louis, Ill.	3.18
East St. Louis & Cairo Railroad—Relay Junction to Broad- way, East St. Louis, Ill. ....	.10
Jacksonville & St. Louis Railway—Through Centralia, Ill..	1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind.06
Chicago & Alton Railway—Near East St. Louis, Ill.70
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Evansville & Terre Haute Railroad:

South Junction to West Junction, Princeton, Ind.	1.64
South Junction to Passenger Station, Evansville, Ind..	.63
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Illinois Central Railroad: Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky.50
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Miles of Road Operated June 30th, 1914—Continued

Kentucky & Indiana Terminal Railroad:

Vincennes Street, New Albany, Ind., to Eleventh Street, Louisville, Ky.	3.00
Louisville, Ky.	6.90
	<hr/> 9.90 <hr/>

Cincinnati, New Orleans & Texas Pacific Railway:

Cincinnati Southern Junction, Ky., to Danville, Ky..	4.88
Chattanooga, Tenn.	2.29
	<hr/> 7.17 <hr/>

Chicago, Indianapolis & Louisville Railway—French Lick, Ind., to West Baden, Ind.	1.00
	<hr/> 484.70 <hr/>

Total Miles of Road Operated. 7,009.94

[fol. 175] Page 15 of the Twenty-first Annual Report of the Southern Railway Company Ended June 30, 1915

Report of the Vice-President and General Manager

Washington, D. C., October 1, 1915.

Mr. Fairfax Harrison, President, Washington, D. C.

DEAR SIR: There is submitted herewith a report of the operations of Southern Railway Company for the year ended June 30, 1915:

Miles of Road Operated June 30, 1915

Location of lines	Owned	Leased or otherwise controlled	Operated under trackage rights	Total miles operated
District of Columbia ....	.....	.....	3.40	3.40
Virginia	565.29	276.84	42.65	884.78
North Carolina	595.39	739.41	120.88	1,455.68
South Carolina	358.40	765.01	5.01	1,128.42
Georgia	655.49	257.03	145.45	1,057.97
Florida .....	.....	.....	41.81	41.81
Alabama	822.39	183.77	31.44	1,037.60
Mississippi	71.92	11.40	19.58	102.90
Tennessee	669.00	35.17	31.33	736.50
Kentucky	127.63	2.09	40.98	170.70

Miles of Road Operated June 30th, 1915—Continued

Location of lines	Owned	Leased or otherwise controlled	Operated under trackage rights	Total miles operated
Indiana	236.17	.....	3.33	239.89
Illinois	157.11	.....	5.78	162.89
Miles Operated June 30, 1915	4,258.79	2,271.72	491.64	7,022.15
Miles Operated June 30, 1914	4,231.95	2,293.29	484.70	7,009.94
[fol. 176] Increase	26.84	.....	6.94	12.21
Decrease .....	.....	21.57	.....	.....

In addition to the railroad operated by it, the Company owns the following lines which are leased to and operated by other companies:

	Miles
Orange, Va., to Gordonsville, Va.—Chesapeake & Ohio Railway Company	9.40
Alexandria, Va., to Bluemont, Va.—Washington & Old Dominion Railway	54.55
Anderson, S. C., to Belton, S. C.—Blue Ridge Railway Company	9.98
Bulls Gap, Tenn., to Rogersville, Tenn.—Virginia & Southwestern Railroad Company	14.10
Gretna, Va., to Pittsville, Va.—Franklin & Pittsylvania Railroad Company	7.10
Total Mileage Leased to and Operated by Other Companies	95.13

The Increase in Miles Operated was occasioned by:

Additional Trackage rights acquired:

From the Atlantic Coast Line Railroad Company—Goldsboro, N. C. ....	.20
From the Seaboard Air Line Railway—Richmond, Va. ....	.50
From the Chesapeake & Ohio Railway Company—Richmond, Va.	2.00
From the Cincinnati, New Orleans & Texas Pacific Railway Company—Lexington, Ky. to Junction City, Ky. ....	.62

[fol. 177] Reclassification to conform to requirements of Federal Commission	3.32
Remeasurement	22.05
	1.76
	27.13

Less:

Miles

Spur to lines of Tennessee Coal, Iron and Railroad Company, Henry Ellen, Ala., Abandoned and removed..	1.02
Line Bushnell, N. C., to Fontana, N. C., operated separately since March 1, 1915	13.90
	<hr/> 14.92
Net Increase in Miles Operated	12.21

[fol. 178] Page 68 of the Twenty-first Annual Report of the Southern Railway Company, Ended June 30, 1915

Miles of Road June 30, 1915

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	282.47
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway) ..	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch.....	4.40
Manassas Junction, Va., to Harrisonburg, Va.	112.89
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.).....	9.40
Leftwich Junction, Va., to Durmid, Va....	5.44
Gretna, Va. to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.).....	7.10
Pomona, N. C. via Winston-Salem to Wilkesboro, N. C.	100.15
Neapolis, Va., via Keysville, Va. to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va..	1.00
Pinners Point, Va. connection with Atlantic Coast Line Railroad .....	.66
Shoulders Hill, Va., to Portsmouth, Va....	10.02
Clarksville, Va. to Durham, N. C.....	55.10
Oxford, N. C. to Henderson, N. C.....	1.55
[fol. 179] Goldsboro, N. C., Cut-off.....	1.55
Salisbury, N. C. via Statesville and Asheville, N. C., to Morristown, Tenn.....	231.37
Charlotte, N. C. via Statesville, N. C. to Taylorsville, N. C.	65.65
Murphy Junction, N. C. to Murphy, N. C....	122.50
Charlotte, N. C. via Columbia, S. C. to Augusta, Ga.	190.49
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20

Miles of Road June 30, 1915—Continued

	Miles
Aiken, S. C., via Trenton, S. C. to Edgefield, S. C.	23.57
Columbia, S. C. via Greenwood, S. C. to Greenville, S. C.	143.52
Hodges, S. C. to Abbeville, S. C.	11.58
Anderson, S. C. to Belton, S. C. (leased to the Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chatta- nooga, Tenn.	242.04
Embreeville Junction, Tenn., to Embree- ville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn. (leased to Virginia & Southwestern Ry. Co.)	14.10
Morristown, Tenn. to Corryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junc- tion, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
[fol. 180] Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville Y, Tenn., to Cambria, Tenn.	3.02
Near Newcomb, Tenn., Spur to Woolridge— Jellico Coal Co.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Stevenson, Ala., to Memphis, Tenn.	271.75
Moscow, Tenn., to Somerville, Tenn.	13.10
Tuscumbia, Ala., to Sweetwater, Ala.	8.30
Ooltewah Junction, Tenn., to Brunswick, Ga.	412.30
North Rome, Ga., to Attalla, Ala.	61.30
Atlanta, Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28
Dock Branch—Dock Junction, Ga., to Tur- tle River Docks, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Missis- sippi State Line	260.70
Villa Rica, Ga., to Mines of Virginia-Caro- lina Chemical Co.	2.92
Jefferson, Ala., to Blossburg, Ala.	1.91
Woodlawn, Ala., to end of Belt Road Besse- mer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40

Miles of Road June 30, 1915—Continued

	Miles	
Cardiff, Ala., to Brazil Miles, Ala.....	1.60	
Littleton, Ala., to Porter, Ala.....	7.70	
Patton Junction, Ala., to Patton, Ala.....	1.10	
Atlanta Junction, Ga., via Selma, Ala., to York, Ala.	270.50	
[fol. 181] Spring Garden, Ala., to Mines, Alabama & Georgia Iron Co.	4.49	
Wilton, Ala., to Valley Creek Junction, Ala.	37.28	
Gurnee Junction, Ala., to Blocton, Ala.	14.30	
Seymour, Ala., to end of track, Piper Spur..	3.91	
Badham Spur, Ala.	5.60	
Galloway Coal Co. Spur.....	.59	
Ardella, Ala., to Hansell, Ala.	2.70	
Marion Junction, Ala., to Akron, Ala.....	53.00	
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47	
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74	
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60	
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.82	
New Albany, Ind., to Illinois State Line, (So Ry. of Ind.)	118.28	
Jasper, Ind., to West Baden, Ind. (So. Ry. of Ind.)	24.80	
Jasper, Ind., to Evansville, Ind. (So. Ry. of Ind.)	54.22	
Lincoln City, Ind., to Cannelton, Ind. (So. Ry., of Ind.)	22.72	
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. of Ind.)	16.15	
	<hr/> 4,158.99	
Brought forward		4,158.99
East St. Louis, Ill., to Indiana State Line ..	146.71	
Belleville Junction, Ill., to Belleville, Ill....	1.14	
Venice & Carondelet, Belt at East St. Louis, Ill.	6.86	
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40	
Okolona, Miss., to Calhoun City, Miss.....	37.82	
Total Mileage Owned		4,353.99
[fol. 182] Total Owned Mileage Operated..	4,258.79	
Total Owned Mileage Leased to Other Com- panies	95.13	

Miles of Road June 30, 1915—Continued

Controlled by Ownership of Securities

(a) Leased:

Southern Railway—Carolina Division:

Kingville, S. C., via Sumter Junction and Blacksburg, S. C., to Marion, N. C.	208.50
Sumter Junction, S. C., to Sumter, S. C.	15.81
Blacksburg, S. C., to Gaffney, S. C.	10.50
Branchville, S. C., via Kingville to Columbia, S. C.	66.30
Biltmore, N. C., to Spantenburg Junction, S. C.	65.72
Hendersonville, N. C., to Lake Texaway, N. C.	42.10
Spantenburg, S. C., to Alston, S. C.	67.93
Charleston, S. C., to Augusta, Ga.	136.90
Kaolin, S. C., to Immaculate Mines, S. C.	2.60
Burton Branch	5.20
Cayce, S. C., via Blackville, to Hardeeville, S. C.	128.63
Perry, S. C., to Sievern, S. C.	7.64

Total	757.83
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Elberton Southern Railway—Tococoa, Ga., to Elberton, Ga.	50.60
Mobile & Birmingham Railroad—Marion Junction, Ala., to Mobile, Ala.	150.35
Richmond & Mecklenburg Railroad—Keysville, Va., to Clarksville, Va.	31.30
[fol. 183] Georgia Midland Railway—MeDonough, Ga., to Columbus, Ga.	97.88

1,087.96	1,087.96
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(b) Not Leased:

State University Railroad—University, N. C., to Chapel Hill, N. C.	10.20
North Carolina Midland Railroad—Mooreville, N. C., to Winston-Salem, N. C.	53.52
High Point, Randleman, Asheboro & Southern R. R.—High Point, N. C., to Asheboro, N. C.	27.59
Yadkin Railroad—Salisbury, N. C., to Norwood, N. C.	41.00
Sievern & Knoxville Railroad—Batesburg, S. C., to Sievern, S. C.	17.44

Miles of Road June 30, 1915—Continued

Atlantic & Yadkin Railway:

Sanford, N. C., to Mt. Airy, N. C.	130.95	
Mt. Airy, N. C., to Woodroffe, N. C.	2.02	
Climax, N. C., to Ramseur, N. C.	18.74	
Stokesdale, N. C., to Madison, N. C.	11.39	
	<hr/>	163.10

Ensley Southern Railway:

Ensley, Ala., to near Warrior River, Ala.	22.73	
Parrish, Ala., to near Warrior River, Ala.	9.24	
Coal Creek Spur, Ala.	1.45	
	<hr/>	33.42

Roswell Railroad:

Chamblee, Ga., to Roswell, Ga.	9.80	
Morgans Falls Branch, Ga. . .	2.75	
	<hr/>	12.55

[fol. 184] Cumberland Railway—Hyde,
Tenn., to point on main stream Clear
Creek, Ky. 11.21

Tennessee & Carolina Southern Railway—
Maryville, Tenn., to Chilhowee, Tenn. . . . 25.30

395.33

Operated under Agreement:

Southern Railway Company in Mississippi—
Columbus, Miss., to Alabama State Line. . . 11.40

Total Mileage covered by Southern
Railway Company Securities. . . . 5,848.61

Miles Operated 5,753.48

Mileage Leased to and Operated by Other
Companies 95.13

Leased:

North Carolina Railroad:

Goldsboro, N. C., via Greens- boro and Salisbury to Char- lotte, N. C.	218.87	
Caraleigh Junction, N. C., to Caraleigh, N. C.	1.90	
	<hr/>	220.77

Miles of Road Operated June 30th, 1915—Continued

Atlanta & Charlotte Air Line Railway—Charlotte, N. C., to Armour, Ga.	263.08	
Atlantic & Danville Railway:		
Danville, Va., to West Norfolk, Va.	205.10	
James River Junction, Va., to Clermont Wharf, Va. (Narrow Gauge)	50.36	
Hitchcock Branch Junction, Va., to Hitchcock Mills, Va.	8.33	
Buffalo Junction, Va., to Buffalo Lithia Springs, Va.	3.90	
	<hr/>	267.69
[fol. 185] North & South Carolina Railroad—Virgilina, Va., to Mines, N. C.	3.73	
Lockhart Railroad—Lockhart Junction, S. C., to Lockhart, S. C.	13.81	
The Whitney Company—Near New London, N. C., to Hall's Mill Ferry, N. C.	6.20	
Woolridge-Jellico Coal Company—Spur near Newcomb, Tenn.	1.75	
	<hr/>	777.03
		<hr/>
		6,625.64

[fol. 186] Page 55 of the Twenty-second Annual Report of the Southern Railway Company Ended June 30, 1916

Miles of Road, June 30, 1916

Owned:

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot—Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	111.85
Frong Royal Branch, Va.	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.) ¹	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10
Neapolis, Va., via Keysville, Va., to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57
Clerksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	12.75

Miles of Road, June 30, 1916—Continued

	Miles
Pomona, N. C., via Winston-Salem, to Wilkesboro, N. C.	100.15
Pinners Point, Va., connection with Atlantic Coast Line Railroad .....	.63
Goldsboro, N. C., Cut-off	1.55
Salisbury, N. C., via Statesville and Asheville, N. C., to Morristown, Tenn.	228.40
[fol. 187] Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga.	190.49
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52
Hodges, S. C., to Abbeville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn. ..	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn. (leased to Virginia & Southwestern Ry. Co.)	14.10
Morristown, Tenn., to Coryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.50
Clinton, Tenn., to Harriman Junction, Tenn.	30.40
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
[fol. 188] Briceville Y. Tenn., to Cambria, Tenn.	3.02
Spur to Woolridge—Jellico Coal Co. near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. Ry.	.49
Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tuscumbia, Ala., connection with Northern Alabama Railway .....	.06
Tuscumbia, Ala., to Sweetwater, Ala.	8.30
Moscow, Tenn., to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., to Brunswick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland) Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28
Dock Branch—Dock Junction, Ga., to Turtle River Docks, near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70

Miles of Road, June 30, 1916—Continued

	Miles
Villa Rica, Ga., to Mines of Virginia-Carolina Chemical Co.	2.92
Woodlawn Junction, Ala., to end of Belt Road Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
Cardiff, Ala., to Brazil Mines, Ala.	1.60
[fol. 189] Jefferson, Ala., to Blossburg, Ala.	1.91
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala. . .	270.50
Spring Gardan, Ala., to Mines of Alabama & Georgia Iron Co.	4.49
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur.	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala. ....	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.) . .	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83
New Albany, Ind., to Illinois State Line, (So. Ry. of Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. of Ind.) . . .	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.) . . .	54.68
Lincoln City, Ind., to Cannelton, Ind., (So. Ry. of Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. of Ind.)	16.15
	<hr/> 4,145.35
[fol. 190] Brought forward	<hr/> 4,145.35
East St. Louis, Ill., to Indiana State Line.	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt at East St. Louis, Ill.	6.81
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss.	37.82
Total Mileage Owned	<hr/> 4,340.28
Total Owned Mileage Operated	<hr/> 4,245.15
Total Owned Mileage Leased to Other Companies.	95.13

[fol. 191] Page 57 of the Twenty-second Annual Report of the Southern Railway Company Ended June 30, 1916

Operated under Trackage Rights

Atlanta Terminal Company—Entrance to Union Passenger Station, Atlanta, Ga. ....	.50
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va. ....	.50
Phila., Balto. & Washington R. R.—Washington, D. C. to South end Potomac Bridge, Va.	2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway—South end Potomac Bridge, Va. to Seminary Junction, Va.	5.70
Seaboard Air Line Railway—Rocketts, Va. to Main St. Station, Richmond, Va. ....	.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va.	2.00

Central of Georgia Railway:

Chattanooga, Tenn. ....	.60
Central Junction, Ga. to West Broad Street, Savannah, Ga.	3.37
Fort Valley, Ga. ....	.10
	<hr/> 4.07

Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga. ....	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga. ....	.25
Western & Atlantic Railroad—W. & A. Crossing, Ga., to Dalton, Ga. ....	.20

[fol. 192] Alabama Great Southern Railroad:

Entrance to Station, Attalla, Ala.	3.44
Woodlawn, Ala., to Birmingham, Ala.	2.11
York, Ala. to Meridian, Miss.	27.16
Central Passenger Station to Louisa Street, Chattanooga, Tenn. ....	.40
Near Wauhatchie, Tenn. to Memphis-Chattanooga Junction, Tenn.	2.15
Connection Memphis-Chattanooga Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn. ....	.77
	<hr/> 36.03

Louisville & Nashville Railroad:

Cumberland Gap, Tenn. to Middlesborough Ky., (So. Ry. in Ky.)	4.41
Stony Fork and Hignite Branch, Ky.	10.41

Miles of Road, June 30, 1913—Continued

Middlesborough Belt and Bennetts Fork Branch, Ky.....	9.81	
Halsey Branch, north of Jellico Yard to Hyde, Tenn.	9.22	
	<hr/>	33.85
Atlantic Coast Line Railroad:		
Pinnars Point, Va. to Selma, N. C.....	154.38	
Hardeeville, S. C. to Central Junction Ga....	16.70	
Four Mile Crossing, Ga. to Union Passenger Station, Brunswick, Ga.....	3.10	
Central Junction, Ga. to Jacksonville, Terminal property line, Jacksonville, Fla.....	152.08	
Entrance to Union Passenger Station, Savannah, Ga.....	.72	
[fol. 193] Central Junction, Ga. to end of double track .....	.09	
Entrance to Union Passenger Station, Goldsboro, N. C.....	.20	
	<hr/>	327.27
Northern Alabama Railway—N. A. Junction to Sheffield, Ala.	3.49	
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.....	.65	
Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn. to Stevenson, Ala.....	38.00	
Jacksonville Terminal Company—Entrance to Union Passenger Station, Jacksonville, Fla.....	1.47	
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.....	.55	
Chattanooga Station Company—Entrance to Union Passenger Station, Chattanooga, Tenn.....	.87	
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.....	4.48	
Terminal Railroad Association of St. Louis—St. Louis, Mo. to Broadway, East St. Louis, Ill.....	3.20	
Jacksonville & St. Louis Railway—through Centralia, Ill. .	1.80	
Baltimore & Ohio Southwestern Railroad—New Albany, Ind. ....	.06	
[fol. 194] Chicago & Alton Railway—Near East St. Louis, Ill. ....	.70	
Evansville & Terre Haute Railroad:		
South Junction to West Junction, Princeton, Ind.	1.64	
South Junction to Passenger Station, Evansville, Ind.....	.63	
	<hr/>	2.27

Miles of Road, June 30, 1916—Continued

Illinois Central Railroad—Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky.....	.50
Kentucky and Indiana Terminal Railroad:	
Vincennes Street, New Albany, Ind. to Eleventh Street, Louisville, Ky.....	3.00
Louisville, Ky.....	4.53
	<hr/> 7.53
Cincinnati, New Orleans & Texas Pacific Railway:	
Entrance to Station, Burgin, Ky.....	.23
Cincinnati Southern Junction, Ky. to Danville, Ky.	4.88
Chattanooga, Tenn.....	2.29
Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.).....	.62
	<hr/> 8.02
St. John's River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.	5.99
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.....	1.00
	<hr/> 495.42
	<hr/>
Total Miles of Road.....	7,135.35
Total Miles of Road Operated.....	7,038.86
Total Miles Leased to and Operated by Other Companies..	96.49

[fol. 195] Page 51, Twenty-third Annual Report of the Southern
Railway Company, Year Ended June 30th, 1917

Table 29—Miles of Road June 30, 1917

Owned:

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	54.55
Cameron Run Bridge, Va., to Alexandria Freight Depot —Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	111.85
Front Royal Branch, Va.	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pitt- sylvania R. R. Co.)	7.10
Neapolis, Va., via Keysville, Va., to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57

Miles of Road, June 30, 1917—Continued

	Miles
Clarksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	12.75
Pomona, N. C., via Winston-Salem, to North Wilkesboro, N. C.	100.15
Pinnars Point, Va., connection with Atlantic Coast Line Railroad ....	.66
Goldsboro, N. C., cut-off	1.55
Salisbury, N. C., via Statesville and Ash-ville, N. C., to Morristown, Tenn.	228.40
Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga. ...	190.40
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52
Kaolin, S. C., to Immaculate Mines, S. C.	2.60
Hodges, S. C., to Abbeyville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Company)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn. ...	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
Bulls Gap, Tenn., to Rogersville, Tenn.	14.10
Morristown, Tenn., to Corryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville, Tenn., to Cambria, Tenn.	3.02
Spur to Woolridge—Jellico Coal Co. near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. R. R. ....	.49
[fol. 196] Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tusculumbia, Ala., connection with Northern Ala- bama Railway ....	.66
Tusculumbia, Ala., to Sweetwater, Ala.	8.30
Moscow, Tenn. to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., via Atlanta, Ga., to Bruns- wick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland), Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
Cochran, Ga., to Hawkinsville, Ga.	10.28

Miles of Road, June 30, 1917—Continued

	Miles
Dock Branch—Dock Junction, Ga., to Turtle River	
Docks near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
Villa Rica, Ga., to Mines of Virginia-Carolina Chemical Co.	2.92
Woodlawn Junction, Ala., to end of Belt Road, Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
Cardiff, Ala., to Brazil Mines, Ala.	1.60
Jefferson, Ala., to Blossburg, Ala.	1.91
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selam, Ala., to York, Ala. . .	270.50
Spring Garden, Ala., to Mines of Alabama & Georgia Iron Co.	4.49
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Scymour, Ala., to end of track, Piper Spur.	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala. ....	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
Louisville, Ky., to Cincinnati Southern Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.) . .	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83
New Albany, Ind., to Illinois State Line (So. Ry. in Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. in Ind.) . .	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.)	54.68
Lincoln City, Ind., to Cannelton, Ind. (So. Ry. in Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind.	16.15
Forward	4,147.95
Brought Forward	4,147.95
East St. Louis, Ill., to Indiana State Line.	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt & East St. Louis, Ill.	6.86
Connection with Chicago & Alton Ry. to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss. (operated by Mobile & Ohio R. R. as Agent)	37.82
Total Mileage Owned	4,342.88
Total Mileage Operated	4,224.03
Total Owned Mileage Leased to and Operated by other Companies	118.85

[fol. 197] Page 53, Twenty-third Annual Report of the Southern Railway Company, Year Ended June 30th, 1917

Table 29—Miles of Road June 30, 1917

	Miles
Brought Forward	6,585.58
Operated under Trackage Rights	
Atlanta Terminal Company—Entrance to Union Passenger Station, Atlanta, Ga. ....	.50
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va. ....	.50
Phila., Balto. & Washington R. R.—Washington, D. C. south end Potomac Bridge, Va.	2.14
Washington Terminal Co.—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway—South End Potomac Bridge, Va. to Seminary Junction, Va.	5.70
Seaboard Air Line Railway—Rocketts, Va. to Main St. Station, Richmond, Va. ....	.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va.	2.00
Central of Georgia Railway:	
Chattanooga, Tenn. ....	.60
Central Junction, Ga. to West Broad St. Savannah, Ga.	3.37
Fort Valley, Ga. ....	.10
	<hr/> 4.07
Augusta & Summerville Railroad—Entrance to Union Passenger Station, Augusta, Ga.	
	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga. ....	.25
Western & Atlantic Railroad—W. & A. Crossing, Ga. to Dalton, Ga. ....	.20
Alabama Great Southern Railroad:	
Entrance to Station, Attalla, Ala.	3.44
Woodlawn, Ala. to Birmingham, Ala.	2.11
York, Ala. to Meridian, Miss.	27.16
Central Passenger Station to Louisa Street, Chattanooga, Tenn. ....	.40
Near Wauhatchie, Tenn. to Memphis, Chattanooga, Junction, Tenn.	2.15
Connection Memphis-Chattanooga, Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn. ....	.77
	<hr/> 36.03

Miles of Road, June 30, 1917—Continued

Louisville & Nashville Railroad:

	Miles
Cumberland Gap, Tenn. to Middlesborough, Ky. (So. Ry. in Ky.)	4.41
Stony Fork and Hignite Branch, Ky.	10.41
Middlesborough Belt and Bennetts Fork Branch, Ky.	9.81
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22
Appalachia, Va. to Norton, Va.	10.00
	<hr/> 43.85 <hr/>

[fol. 198] Atlantic Coast Line Railroad:

Pinners Point, Va. to Selma, N. C.	154.38
Hardeeville, S. C. to Central Junction, Ga.	16.70
Four Mile Crossing, Ga., to Union Passenger Sta- tion, Brunswick, Ga.	3.10
Central Junction, Ga. to Jacksonville Terminal property line, Jacksonville, Fla.	152.08
Entrance to Union Passenger Station, Savannah, Ga. ....	.72
Central Junction, Ga., to end of double track. ....	.09
Entrance to Union Passenger Station, Goldsboro, N. C. ....	.20
	<hr/> 327.27 <hr/>

Northern Alabama Railway—N. A. Junction to Shef- field, Ala.	3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss. ....	.65
Nashville, Chattanooga & St. Louis Railway—Chatta- nooga, Tenn. to Stevenson, Ala.	38.00
Jacksonville Terminal Co.—Entrance to Union Passen- ger Station, Jacksonville, Fla.	1.47
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn. ....	.55
Chattanooga Station Company—Entrance to Union Pas- senger Station, Chattanooga, Tenn. ....	.87
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.	4.48
Terminal Railroad Association of St. Louis, Mo. to Broadway, East St. Louis, Ill.	3.28
Jacksonville & St. Louis Railway—Through Centralia, Ill.	1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind. ....	.06
Chicago & Alton Railway—Near East St. Louis, Ill. ....	.70

Miles of Road, June 30, 1917—Continued

Evansville & Terre Haute Railroad:		Miles
South Junction to West Junction, Princeton, Ind..		1.64
South Junction to Passenger Station, Evansville, Ind. ....		.63
		<hr/> 2.27 <hr/>
Illinois Central Railroad:		
Eleventh Street to Seventh Street Union Passenger Station, Louisville, Ky. ....		.50
		<hr/>
Kentucky & Indiana Terminal Railroad:		
Vincennes Street, New Albany, Ind., to Eleventh Street, Louisville, Ky.		3.00
Louisville, Ky.		4.53
		<hr/> 7.53 <hr/>
Cincinnati, New Orleans & Texas Pacific Railway:		
Entrance to Station, Burgin, Ky. ....		.23
Cincinnati Southern Junction, Ky. to Danville, Ky.		4.88
Chattanooga, Tenn.		2.29
Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.) ....		.62
		<hr/> 8.02 <hr/>
[fol. 199] St. John's River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.		5.99
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.		1.00
Norfolk & Western Railway—Norton, Va. to Toms Creek, Va.		12.08
		<hr/> 517.50 <hr/>
Total Miles of Road		<hr/> 7,103.08 <hr/>
Total Miles of Road Operated.....		6,982.87
Total Miles Leased to and Operated by Other Companies		120.21

[fol. 200] Page 19 of the Twenty-fifth Annual Report of the Southern Railway Company, Ended December 31, 1918

Miles of Road

Owned:

	Miles
Seminary Junction, near Alexandria, Va., to Greensboro, N. C.	278.58
Alexandria, Va., to Bluemont, Va. (leased to Washington & Old Dominion Railway)	53.27
Cameron Run Bridge, Va., to Alexandria Freight Depot —Union St. Branch	4.40
Manassas Junction, Va., to Harrisonburg, Va.	111.85
Front Royal Branch, Va.	1.04
Calverton, Va., to Warrenton, Va.	8.90
Orange, Va., to Gordonsville, Va. (leased to Chesapeake & Ohio Railway Co.)	9.40
Leftwich Junction, Va., to Durmid, Va.	5.44
Gretna, Va., to Pittsville, Va. (leased to Franklin & Pittsylvania R. R. Co.)	7.10
Neapolis, Va., via Keysville, Va., to West Point, Va.	179.00
Manchester Junction, Va., to Rocketts, Va.	1.57
Clarksville, Va., to Durham, N. C.	55.10
Oxford, N. C., to Henderson, N. C.	112.75
Pomona, N. C., via Winston-Salem, to North Wilkesboro, N. C.	100.15
[fol. 201] Pinners Point, Va., connection with Atlantic Coast Line Railroad .....	.66
Goldsboro, N. C., Cut-off	1.55
Salisbury, N. C., via State <i>svo;e</i> and Asheville, N. C., to Morristown, Tenn.	228.40
Morristown, Tenn., Cut-off	2.97
Charlotte, N. C., via Statesville, N. C., to Taylorsville, N. C.	65.65
Atlantic, Tennessee & Ohio Cut-off, North Charlotte, N. C.	1.20
Murphy Junction, N. C., to Murphy, N. C.	122.50
Charlotte, N. C., via Columbia, S. C., to Augusta, Ga.	190.49
Aiken, S. C., via Trenton, S. C., to Edgefield, S. C.	23.57
Columbia, S. C., via Greenwood, S. C., to Greenville, S. C.	143.52
Kaolin, S. C., to Immaculate Mines, S. C.	2.60
Hodges, S. C., to Abbeyville, S. C.	11.58
Anderson, S. C., to Belton, S. C. (leased to Blue Ridge Railway Co.)	9.98
Lula, Ga., to Athens, Ga.	38.93
Bristol, Tenn., via Knoxville, to Chattanooga, Tenn.	241.55
Embreeville Junction, Tenn., to Embreeville, Tenn.	13.00
[fol. 202] Bulls Gap, Tenn., to Rogersville, Tenn.	14.10
Morristown, Tenn., to Corryton, Tenn.	39.60
Knoxville, Tenn., to Walland, Tenn.	26.21
Knoxville, Tenn., to Jellico, Tenn.	65.30

Miles of Road, December 31, 1918—Continued

	Miles
Coster, Tenn., to Cumberland Gap Junction, Tenn.	63.56
Clinton, Tenn., to Harriman Junction, Tenn.	30.44
Coal Creek, Tenn., to Briceville, Tenn.	3.10
Briceville, Tenn., to Minersville, Tenn.	2.84
Briceville Y. Tenn., to Cambria, Tenn.	3.02
Spur to Wooldridge-Jellico Coal Co., near Newcomb, Tenn.	2.08
La Follette Junction, Tenn., to Vasper, Tenn.	11.30
Cleveland, Tenn., to Cohutta, Ga.	14.80
Chattanooga, Tenn., connection with C. N. O. & T. P. Ry.	.49
Stevenson, Ala., to Memphis, Tenn.	271.69
Near Tusculumbia, Ala., connection with Northern Ala- bama Railway ....	.06
Tusculumbia, Ala., to Sweetwater, Ala.	8.30
Moscow, Tenn., to Somerville, Tenn.	13.10
Ooltewah Junction, Tenn., via Atlanta, Ga., to Bruns- wick, Ga.	412.30
Forrestville, Ga., to Attalla, Ala.	61.30
Atlanta (Roseland), Ga., to Fort Valley, Ga.	102.30
Howell, Ga., to Armour, Ga.	3.30
[fol. 203] Cochran, Ga., to Hawkinsville, Ga.	10.28
Dock Branch—Dock Junction, Ga., to Turtle River Docks, near Brunswick, Ga.	1.80
Austell, Ga., via Anniston, Ala., to Mississippi State Line	260.70
Villa Rica, Ga., to Lines of Virginia-Carolina Chemical Co.	2.92
Woodlawn Junction, Ala., to end of Belt Road, Bessemer, Ala.	20.50
North Birmingham, Ala., to Coalburg, Ala.	6.40
Cardiff, Ala., to Brazil Mines, Ala.	1.60
Jefferson, Ala., to Blossburg, Ala.	1.91
Littleton, Ala., to Porter, Ala.	7.70
Patton Junction, Ala., to Patton, Ala.	1.10
Atlanta Junction, Ga., via Selma, Ala., to York, Ala. ...	270.50
Spring Garden, Ala., to Mines of Alabama & Georgia Iron Co.	4.40
Wilton, Ala., to Valley Creek Junction, Ala.	37.28
Gurnee Junction, Ala., to Blocton, Ala.	14.30
Seymour, Ala., to end of track, Piper Spur.	3.91
Badham Spur, Ala.	5.60
Galloway Coal Co. Spur near Aden, Ala. ....	.59
Ardela, Ala., to Hansell, Ala.	2.70
Marion Junction, Ala., to Akron, Ala.	53.00
[fol. 204] Louisville, Ky., to Cincinnati Southern Junc- tion, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.) ..	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60
Norton, Ky., to Burgin, Ky. (So. Ry. in Ky.)	3.83

Miles of Road, June 30, 1918—Continued

	Miles
New Albany, Ind., to Illinois State Line (So. Ry. in Ind.)	118.28
Jasper, Ind., to French Lick, Ind. (So. Ry. in Ind.)	24.03
Jasper, Ind., to Evansville, Ind. (So. Ry. in Ind.)	54.68
Lincoln City, Ind., to Cannelton, Ind. (So. Ry. in Ind.)	22.72
Rockport Junction, Ind., to Rockport, Ind. (So. Ry. in Ind.)	1
	16.15
	<hr/>
	4,146.67
East St. Louis, Ill., to Indiana State Line	146.71
Belleville Junction, Ill., to Belleville, Ill.	1.14
Venice & Carondelet Belt at East St. Louis, Ill.	6.86
Connection with Chicago & Alton Ry., to North Incline Terminal, East St. Louis, Ill.	2.40
Okolona, Miss., to Calhoun City, Miss.	37.82
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Total Mileage Owned	4,341.60
	<hr/>
Total Owned Mileage	4,261.85
Total Owned Mileage leased to other Companies	70.75

[fol. 205] Page 21 of the Twenty-fifth Annual Report of the Southern Railway Company, Ended December 31, 1918

Miles of Road

Brought forward	6,584.30
Trackage Rights:	
Atlanta terminal Company—Entrance to Union Passenger Station, Atlanta, Ga.	.50
Baltimore & Ohio Railroad—Entrance to Passenger Station, Harrisonburg, Va.	.50
Phila., Balto. & Washington R. R.—Washington, D. C. to South end Potomac Bridge, Va.	2.14
Washington Terminal Company—Entrance to Union Passenger Station, Washington, D. C.	1.26
Washington Southern Railway—South end Potomac Bridge, Va. to Seminary Junction, Va.	5.70
Seaboard Air Line Railway—Rocketts, Va. to Main St. Station, Richmond, Va.	.50
Chesapeake & Ohio Railway—Park Siding, Va. to Main St. Station, Richmond, Va.	2.00
Central of Georgia Railway:	
Chattanooga, Tenn.	.60
Central Junction, Ga. to West Broad Street, Savannah, Ga.	3.37
Fort Valley, Ga.	.10
	<hr/>
	4.07

Miles of Road, December 31, 1918—Continued

Augusta and Summerville Railroad—entrance to Union Passenger Station, Augusta, Ga.....	.49
Georgia Railroad—Entrance to Union Passenger Station, Augusta, Ga.....	.25
[fol. 206] Western and Atlantic Railroad—W. & A. Crossing, Ga. to Dalton, Ga.....	.20

Alabama Great Southern Railroad:

Entrance to Station, Attalla, Ala.....	3.44
Woodlawn, Ala. to Birmingham, Ala.....	2.11
York, Ala. to Meridian, Miss.....	27.16
Central Passenger Station to Louisa St., Chattanooga, Tenn.....	.40
Near Wauhatchie, Tenn. to Memphis-Chattanooga Junction, Tenn.....	2.15
Connection Memphis-Chattanooga Ry. to connection Central of Georgia Ry. near Chattanooga, Tenn.....	.77
	<hr/>
	36.03

Louisville & Nashville Railroad:

Cumberland Gap, Tenn. to Middlesboro, Ky. (So. Ry. in Ky.).....	4.41
Stony Fork and Hignite Branch, Ky.....	10.41
Middlesborough Belt and Bennets Fork Branch, Ky.	9.81
Halsey Branch, north of Jellico Yard, to Hyde, Tenn.	9.22
Appalachia, Va. to Norton, Va.....	10.00
	<hr/>
	43.85

Atlantic Coast Line Railroad:

Pinners Point, Va. to Selma, N. C.....	154.38
Hardeeville, S. C. to Central Junction, Ga....	16.70
[fol. 207] Four Mile Crossing, Ga. to Union Passenger Station, Brunswick, Ga.....	3.10
Central Junction, Ga. to Jacksonville Terminal property line, Jacksonville, Fla.....	152.08
Entrance to Union Passenger Station, Savannah, Ga.....	.72
Central Junction, Ga. to end of double track.	.09
Entrance to Union Passenger Station, Goldsboro, N. C.....	.20
	<hr/>
	327.27

Northern Alabama Railway—N. A. Junction to Sheffield, Ala.	3.49
Southern Railway Company in Mississippi—Entrance to Passenger Station, Columbus, Miss.....	.65

Miles of Road, December 31, 1918—Continued

Nashville, Chattanooga & St. Louis Railway—Chattanooga, Tenn. to Stevenson, Ala.....	38.00
Jacksonville Terminal Company—Entrance to Union Station, Jacksonville, Fla.....	1.47
Memphis Union Station Company—Entrance to Union Passenger Station, Memphis, Tenn.....	.55
Chattanooga Station Company—Entrance to Union Passenger Station, (Chattanooga, Tenn.....	.87
Savannah Union Station Company—Entrance to Union Passenger Station, Savannah, Ga.....	4.48
[fol. 208] Terminal Railroad Association of St. Louis—St. Louis, Mo. to Broadway, East St. Louis, Ill.....	3.28
Jacksonville & St. Louis Railway—Through Centralia, Ill.	1.80
Baltimore & Ohio Southwestern Railroad—New Albany, Ind. ....	.03
Chicago & Alton Railway—Near East St. Louis, Ill.....	.70
Evansville & Terre Haute Railroad:	
South Junction to West Junction, Princeton, Ind.	1.64
South Junction to Passenger Station, Evansville, Ill. ....	.63
	<hr/> 2.27
Illinois Central Railroad: Eleventh Street to Seventh Street, Union Passenger Station, Louisville, Ky.....	.50
Kentucky and Indiana Terminal Railroad:	
Vincennes Street, New Albany, Ind. to Eleventh Street, Louisville, Ky.....	3.00
Louisville, Ky.....	4.53
	<hr/> 7.53
Cincinnati, New Orleans & Texas Pacific Railway:	
Entrance to Station, Burgin, Ky.....	.23
Cincinnati Southern Junction, Ky. to Danville, Ky.	4.88
Chattanooga, Tenn.....	2.29
[fols. 209 & 210] Lexington Junction, Ky. to Lexington, Ky. (So. Ry. in Ky.).....	.62
	<hr/> 8.02
St. Johns River Terminal—Near Grand Crossing, Fla. to Bay St. Freight Depot, Jacksonville, Fla.....	5.99
Chicago, Indianapolis & Louisville Railway—French Lick, Ind. to West Baden, Ind.....	1.00
Norfolk & Western Railway—Norton, Va. to Toms Creek, Va.	12.08
	<hr/> 517.50
Total Miles of Road.....	<hr/> <hr/> 7,101.80

I N C O M E A C C O U N T

YEAR ENDED JUNE 30, 1914.

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	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY. COMPANY	STATE UNIVERSITY RAILROAD	N.C.MID. R.R.	HIGH POINT RANDLEMAN ASHEBORO & SOUTHERN	YADKIN RAILROAD COMPANY	ATLANTIC AND YADKIN	ROSWELL RAILROAD COMPANY	CAROLINA AND TENNESSEE SOUTHERN	TENNESSEE AND CAROLINA SOUTHERN	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
<u>RAILWAY OPERATING INCOME</u>													
Rail Operations-Revenue...	66,653,760.71	1,471,729.81	30,980.00	37,743.07	445,306.06	113,468.01	184,796.84	512,699.69	11,477.52	9,204.13	17,660.58	17,025.47	27,845.35
Rail Operations-Expenses..	47,987,089.20	1,360,168.38	40,552.83	26,070.95	281,696.96	84,184.71	138,803.76	469,013.16	19,994.98	10,981.48	19,876.18	29,044.94	103,697.01
Net Revenue Rail Operatns.	18,666,671.51	111,561.43	19,572.83	11,672.12	163,609.10	29,283.30	45,993.08	43,686.53	8,517.46	1,777.35	2,215.60	12,019.47	175,851.66
Auxiliary Opn-Revenues....	1,217,299.51												
Expenses....	1,189,474.73												
Net Revenue-Auxiliary Opns	27,824.78												
Net Ry.Operating Revenue..	18,694,496.29	111,561.43	19,572.83	11,672.12	163,609.10	29,283.30	45,993.08	43,686.53	8,517.46	1,777.35	2,215.60	12,019.47	175,851.66
Railway Tax Accruals.....	2,605,847.82	21,479.57	1,585.84	489.19	14,889.45	4,355.55	3,427.50	21,982.32	1,423.90	409.51	3,409.02		
Railway Operating Income..	16,088,648.47	90,081.86	11,158.67	11,182.93	148,719.65	24,927.75	42,565.58	21,704.21	9,941.36	2,276.86	5,624.62	12,019.47	175,851.66
<u>OTHER INCOME</u>													
Income from Lease of Road.	65,000.00								6,470.62				
Hire of Eqpmnt.-Cr.Balance								4,852.90					
Jt.Facility Rent Income...	195,769.21		15,610.91		732.23								
Misc.Rent Income.....	110,291.69	760.67		13.00	238.58	74.40	146.84	443.23	38.53				
Net Profit from Misc. Phy- scl. Property	26,123.51												
Sep. Operated Properties..	671.18												
Dividend Income.....	1,331,794.24												
Income from Funded Sectrs.	1,380,317.26												
Income from Unfunded Se- curities and Accounts...	131,722.78					62.88							
Income from Sinking and Other Reserve Funds.....	35,875.00												
Release of Premiums on Funded Debt.....	166.84												
Miscellaneous Income.....	122.25												
Total Other Income.....	3,277,853.98	760.67	15,610.91	13.00	970.81	137.28	146.84	5,296.13	6,509.15				
Gross Income.....	19,366,502.43	90,842.53	4,452.24	11,195.93	149,690.46	25,065.03	42,712.42	27,000.34	13,432.21	2,276.86	5,624.62	12,019.47	175,851.66
<u>DEDUCTIONS FROM GROSS INCOME</u>													
Deductions for lease of other roads.....	1,894,998.31												
Hire of Eqm't-Dr.Balance..	378,830.41												
Jt.Facility Rent Deductns.	817,097.20	222,017.22	12,695.49	2,306.04	88,547.35	28,972.50	38,812.95	252.60	195.39	395.52	188.47		133.28
Misc. Rent Deductions.....	38,276.45	413.60											
Misc.Tax Accruals.....													
Net Loss on Misc Phys Prop													
Sep. Operated Properties..	189,887.02	334.62											
Interest Deductions for Funded Debt.....	10,939,596.37	139,850.00	21,920.00		48,060.00	24,120.00	36,900.00	60,000.00	6,750.00	14,800.00	35,600.00		
Interest Deductions for Unfunded Debt.....	37.93	135,251.04		10,127.26		10,483.52	52,894.21	5,407.28					
Amortization of discount on Funded Debt.....													
Transfer of Income to other Companies.....													
Miscellaneous Deductions..	13,001.76												
Total Deductions.....	14,271,725.45	564,963.57	35,702.95	12,433.30	138,607.35	63,576.02	128,607.16	65,659.88	6,945.39	15,195.52	35,788.47	218.42	57,955.00
Net Income.....	5,094,776.98	1474,121.04	11,250.71	11,237.37	13,083.11	18,510.99	185,894.74	138,659.54	10,377.60	17,472.38	11,413.09	12,237.89	133,939.94

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income...	16,088,648.47	90,081.86	11,158.67	11,182.93	148,719.65	24,927.75	42,565.58	21,704.21	9,941.36	2,276.86	5,624.62	12,019.47	175,851.66
Hire of Equipment - Net...	1378,830.41	167,097.09	11,087.46	2,306.04	88,547.35	28,972.50	38,812.95	4,852.90	195.39	395.52	188.47		133.28
Jt.Facility Rent - Net....	1621,327.99	222,017.22	2,915.42		732.23			252.60					
Net Railway Op. Income....	15,087,490.07	1199,032.45	19,330.71	8,876.89	60,904.53	14,044.75	3,752.63	26,304.51	10,136.75	2,672.38	5,813.09	12,019.47	175,984.94

NOTE:---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

I N C O M E A C C O U N T

YEAR ENDED JUNE 30, 1914

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	A.G.S.	A. & C.MTN BLUE RIDGE	CUMS.R.R.	D.A.W.	M. & O.	G. S. & F.	HARTWELL	NOR.ALA.	TAL.FALLS	V. & S. W.
RAILWAY OPERATING INCOME										
Rail Operations-Revenue.....	5,385,307.45	7,600.48	181,668.77	54,518.00	343,044.37	12,975,430.72	2,596,548.56	29,555.75	582,370.48	149,153.92
Rail Operations-Expenses.....	4,227,463.71	4,174.21	145,377.03	42,962.97	207,937.14	10,075,827.48	2,116,962.06	21,684.68	410,084.53	117,910.90
Net Revenue Rail Operation.....	1,157,843.74	3,426.27	36,291.74	11,555.03	135,107.23	2,899,603.24	484,586.50	7,871.07	172,285.95	31,243.02
Auxiliary Operation-Revenues..										
" Expenses..										
Net Revenue-Auxiliary Opns....	X6,607.18					X19,165.29	X1,348.48			
Net Ry.Operating Revenue.....	1,151,236.56	3,426.27	36,291.74	11,555.03		2,880,437.95	483,238.02	7,871.07	172,285.95	31,243.02
Railway Tax Accruals.....	189,856.61	289.89	6,646.13	517.80	13,364.02	416,518.98	136,219.70	639.02	31,907.20	5,120.74
#Railway Operating Income.....	961,379.95	3,136.38	29,645.61	11,037.23	121,743.21	2,463,918.97	347,018.32	7,232.05	140,378.75	26,122.28
OTHER INCOME										
Income from Lease of Road.....										
Hire of Equipmt.-Cr.Balance.....	186,203.54						134,483.53			189,044.91
Jt.Facility Rent Income.....		150.00	265.32			40,314.71	13,013.37		49,359.77	4,449.78
Misc.Rent Income.....	33,406.31		775.37	111.03		10,714.15	3,189.70	136.60	91.57	1,207.63
Net Profit from Misc.Physchl.										
Property.....							5,165.71		177.16	924.99
Separately Operated Properties.										
Dividend Income.....										
Income from Funded Securities..	157,892.06					34,462.31	750.00			
Income from Unfunded Securi-										
ties and Accounts.....					525.01		4,857.03		103.01	6,450.56
Income from Sinking and										
Other Reserve Funds.....										
Release of Premium on										
Funded Debt.....										
Miscellaneous Income.....						22,452.26				42.35
Total Other Income.....	377,501.91	150.00	1,040.69	111.03	525.01	107,943.73	161,459.34	136.60	49,731.51	202,120.22
Gross Income.....	1,338,881.86	3,286.38	30,686.30	11,148.26	122,268.22	2,571,862.70	508,477.66	7,368.65	149,110.26	26,188.28
DEDUCTIONS FROM GROSS INCOME										
DEductions for lease of										
ether roads.....		4,000.00				48,106.99				10,000.00
Hire of Equipmt.-Dr.Balance.....		13,150.37	10,727.67	7,991.87	203,182.15		1,474.61	124,929.95	10,212.35	
Jt.Facility Rent Deductions...		240.00		1,568.75	566,560.06		47,271.20			34,800.61
Misc. Rent Deductions.....	100,649.99		65.26	286.20			20.70	395.00	60.00	
Misc.Tax Accruals.....										
Net Loss on Misc. Phys.Properties..										
Separately Operated Properties...										
Interest Deductions for										
Funded Debt.....	351,332.55	5,000.00	16,911.96	53,489.33	1,494,068.34	303,310.00	1,000.00	83,500.00	76,076.00	
Interest Deductions for										
Unfunded Debt.....				24,915.46		7,213.25	2.26	13,844.16		
Amortization of discount										
on Funded Debt.....										2,234.64
Transfer of Income to other										
Companies.....										
Miscellaneous Deductions.....	129,712.47	28.91	22,390.37	27,704.89	88,251.61	174,836.36	409.65	2,476.87	221,669.11	1,043.75
Total Deductions.....	581,695.01	28.91	22,390.37	27,704.89	88,251.61	2,486,753.90	358,224.80	2,476.87	221,669.11	423,548.16
Net Income.....	757,186.85	3,257.47	8,295.93	X16,556.63	34,016.61	85,108.80	150,252.86	4,981.78	X31,558.85	X60,160.07

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of which debts and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income	961,379.95	3,136.38	29,645.61	11,037.23	121,743.21	2,463,918.97	347,018.32	7,232.05	140,378.75	26,122.28	490,826.74
Hire of Equipment-Net.....	186,203.54		X13,150.37	X10,727.67	X7,991.87	X203,182.15	134,483.53	X1,474.61	X124,929.95	X10,212.35	189,044.91
Joint Facility Rent-Net.....		150.00	25.32		11,568.75	X526,245.35	134,257.83		49,359.77		X30,350.83
Net Railway Operating Income.....	1,147,583.49	3,286.38	16,520.56	309.58	112,182.59	1,734,491.47	447,244.62	5,757.44	64,808.57	15,909.93	549,520.82

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

X Denotes Red in Copy

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1915.

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	SOU.RY.CO.	SOU.RY.CO. IN KEW.	CUMB.RY.CO.	STATE UNIVERSITY RAILROAD	NORTH CAROLINA MIDLAND	H P R A & S YADKIN	ATLANTIC AND YADKIN	ROSWELL	TENN. AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME											
Railway Operating Revenues..	59,789,310.60	1,237,126.10	31,384.75	32,820.49	393,075.32	84,884.91	139,078.99	436,445.74	15,443.93	12,261.38	10,341.83
Railway Operating Expenses..	43,777,958.85	1,215,545.38	42,441.60	21,615.94	269,921.61	83,407.30	119,384.72	495,920.51	22,102.48	26,123.85	27,472.11
Net Revenue from Ry.Bprn....	16,011,351.75	21,580.72	11,056.85	11,204.55	123,153.71	1,477.61	19,694.27	159,474.77	16,658.55	13,682.47	17,130.28
Railway Tax Accruals.....	2,512,303.78	28,241.34	1,852.45	464.75	13,917.69	4,300.60	3,315.88	21,539.26	1,362.91	2,998.63	5,530.98
Uncollectible Ry.Revenues....	27,969.60	316.06	4.99	8.28	201.04	51.76	19.96	338.16	2.69	1.35	2.20
# Railway Operating Income....	13,471,078.37	16,976.68	12,914.29	10,731.52	109,034.98	12,874.75	16,358.43	181,352.19	18,024.15	16,862.45	17,130.28
Revenues from Misc.Opns.....											
Expenses of Misc. Opns.....											
Net.Rev.from Misc.Opns.....											
Taxes on Misc.Opns.Prop.....											
Misc.Operating Income.....											
Total Operating Income....	13,471,078.37	16,976.68	12,914.29	10,731.52	109,034.98	12,874.75	16,358.43	181,352.19	18,024.15	16,862.45	17,130.28

NON OPERATING INCOME

Hire of Frt.Cars-Cr.Bal.....	87,167.41										
Rent from Locomotives.....	211,352.92										
Rent from Pass.Train Cars...	1,247.50										
Rent from floating Equipm't..	21,334.22										
Jt.Facility Rent Income.....	268,651.47		15,151.82		673.95						
Income from Lease of Road...	65,880.00										
Misc. Rent Income.....	124,440.58	1,337.48		10.00	440.60	349.00	139.93	485.29	45.00		
Misc. Non-Operating Physical Property.....	23,280.85										
Separately Operated Proper- ties-Profit.....	32.92										
Dividend Income.....	1,080,243.89										
Income from Funded Securits.	1,071,170.78										
Income from Unfunded S&A....	505,134.62										
Income from Sinking and Other Reserve Funds.....	37,855.00										
Release of Premiums on Funded Debt.....											
Contributions from other Companies.....											
Miscellaneous Income.....	330.56										
Total Non-Operating Income..	3,498,122.72	1,337.48	15,151.82	10.00	1,114.55	349.00	139.93	485.29	45.00		
Gross Income.....	16,969,201.09	18,314.16	28,066.11	10,741.52	110,149.53	13,223.75	16,498.36	180,837.48	18,069.15	16,862.45	17,130.28

DEDUCTIONS FROM GROSS INCOME

Hire of Frt.Cars-Dr.Bal.....	684,667.37	39,592.65	17,896.00	8,834.15	80,682.00	30,490.05	39,078.10	7,246.20	9,671.55	3,120.00	5,837.80
Rent for Locomotives.....	29,141.00										
Rent for Pass.Train Cars....	183,438.31										
Rent for Floating Equipm't....	16,433.18										
Jt.Facility Rents.....	899,080.34	135,055.63	12,910.12					96.94			
Rent for Leased Roads.....	1,585,625.75										
Miscellaneous Rents.....	40,837.36	728.72									
Miscellaneous Tax Accruals..											
Separate Operated Prop-Loss.	183,020.90	620.86									
Interest on Funded Debt.....	10,925,806.19	139,850.00	21,920.00		48,080.00	24,120.00	36,900.00	60,000.00	6,750.00	35,600.00	57,955.00
Interest on Unfunded Debt...	2,294.52					12,438.38	56,194.19				
Amortization of discount on Funded Debt.....											
Maintenance of Investment Organization.....	24,283.66										
Income trans. to Other Companies.....											
Misc. Income Charges.....	25,728.21										8,080.00
Total Deductions from G.L.	14,500,356.79	315,847.85	52,726.12	8,834.15	128,742.00	57,048.43	132,172.29	67,343.14	16,421.55	35,720.00	5,837.80
Net Income.....	2,368,844.30	18,466.31	25,339.99	1,907.37	18,592.47	13,175.32	14,326.07	113,494.34	11,647.60	11,142.45	11,292.48

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income....	13,471,078.37	16,976.68	12,914.29	10,731.52	109,034.98	12,874.75	16,358.43	181,352.19	18,024.15	16,862.45	17,130.28
Hire of Equipment-Net.....	1592,577.81	139,592.65	17,896.00	8,834.15	80,682.00	30,490.05	39,078.10	7,246.20	9,671.55	3,120.00	5,837.80
Joint Facility Rent-Net.....	1630,428.87		2,241.70		673.95			96.94			
Net Railway Operating Income	12,248,071.69	181,624.96	28,568.59	1,897.37	29,026.93	13,364.80	12,279.67	188,695.33	17,695.70	19,982.45	12,292.48

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Accounts.

x Denotes Red in Copy

I N C O M E A C C O U N T

YEAR ENDED JUNE 30, 1918.

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	A. G. S.	A. & C. MTN.	BLUE RIDGE	CUMB RR	C & T S	D. & W.	G S & F	HARTWELL	M. & O.	NOR. ALA.	TALL FALLS	V S & W
OPERATING INCOME												
Railway Operating Revenues....	4,776,629.89	5,715.35	176,209.38	56,156.62	18,711.95	344,212.68	2,215,773.23	24,358.55	10,982,149.06	530,068.81	117,560.72	1,799,300.80
Railway Operating Expenses....	3,653,733.63	6,400.07	135,651.66	45,062.00	11,613.94	209,603.81	1,843,662.29	16,942.01	7,933,656.29	553,338.32	133,016.47	1,338,705.51
Net Revenue from Ry. Oprn.....	1,122,896.26	1684.72	40,557.72	11,094.62	7,098.01	134,608.87	372,110.94	7,416.54	3,048,492.77	176,730.49	4,544.25	460,595.29
Railway Tax Accruals.....	177,929.98	280.65	6,063.62	491.89	505.13	16,433.34	116,180.43	575.05	385,591.08	32,148.34	5,349.57	80,814.91
Uncollectible Ry. Revenues.....	703.46		63.45		.08		2,525.30		2,139.67	233.62	8.53	11.46
# Railway Operating Income.....	944,262.82	x965.37	34,430.65	10,602.73	6,592.80	118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
Revenues from Misc. Opns.....												
Expenses of Misc. Operations....												
Net Rev. from Misc. Opns.....												
Taxes on Misc. Oprn. Prop.....												
Misc. Operating Income.....												
Total Operating Income.....	944,262.82	x965.37	34,430.65	10,602.73		118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
NON OPERATING INCOME												
Jt. Facility Rent Income.....		150.00	200.55				10,666.70		39,976.57	53,392.53		3,530.02
Hire of Frt. Cars-Cr. Bal.....	104,107.83						79,467.00					172,538.45
Rent from Locomotives.....												
Rent from Pass. Train Cars.....												
Rent from floating Eqpm't.....												
Rent from Wk. Equipment.....												
Income from Lease of Road.....												
Misc. Rent Income.....	22,661.21		816.35	15.33	5.00		3,696.84	65.00	10,563.98	94.20	81.00	1,434.92
Misc. Non-Operating Physical Property.....							1,042.58			170.20		1,045.37
Separately Operated Properties-Profit.....												
Dividend Income.....							3,114.00					
Income from Funded Securities.	112,698.75						750.00		1,745.00			
Income from Unfunded S. & A....			2,063.84			598.82	9,421.09			310.00	10.86	1,074.22
Income from Sinking and Other Reserve Funds.....												
Release of Premiums on Funded Debt.....												
Contributions from other Companies.....												
Miscellaneous Income.....									14,660.06		1.50	
Total Non-Operating Income.....	239,467.79	150.00	3,080.74	15.33	5.00	598.82	108,158.21	65.00	66,945.81	53,966.93	93.36	179,622.98
Gross Income.....	1,183,730.61	x815.37	37,511.39	10,618.06	6,597.80	118,774.35	361,563.42	6,906.49	2,727,707.63	198,315.46	x720.49	559,391.90
DEDUCTIONS FROM GROSS INCOME												
Hire of Frt. Cars-Dr. Bal.....			10,057.43	12,271.79	18,072.14	7,318.75		740.10	129,917.25	92,033.51	2,920.07	
Jt. Facility Rents.....			240.00			1,568.75			534,244.68	2,809.19		36,864.38
Rent for Locomotives.....	4,456.00		480.85				48,402.47			31,148.07	352.00	
Rent for Pass. Train Cars.....			1,043.78			115.39		29.16		4,582.36	422.90	
Rent for Floating Eqpm't.....												
Rent for Work Equipment.....										703.18		
Rent for Leased Roads.....			4,000.00									10,000.00
Miscellaneous Rents.....	100,676.60			62.54		286.20				395.00	60.00	
Miscellaneous Tax Accruals....							599.00					
Separate Operated Prop-Loss....												
Interest on Funded Debt.....	340,625.95	18.87	5,689.58	16,911.96	14,800.00	91,581.69	299,125.00	1,000.00	1,531,098.41	96,344.16	76,643.33	403,920.02
Interest on Unfunded Debt.....							7,580.00					
Amortization of discount on Funded Debt.....												
Maintenance of Investment Organization.....												
Income transferred to Other Companies.....												
Miscellaneous Income Charges..	116,353.81						836.53		203,779.34			1,977.18
Total Deductions from Gross Income.....	557,556.36	4,474.87	21,511.64	29,246.29	32,872.14	100,870.78	356,643.48	1,769.26	2,399,039.68	228,015.47	80,398.30	452,761.58
Net Income.....	626,174.25	x5,290.24	15,999.75	x18,628.23	x26,274.34	17,903.57	5,019.94	5,137.23	328,667.95	x29,700.01	x81,118.79	106,630.32

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the Annual Railway Operating Income in the computation of which debits and credits arising from the Accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income	944,262.82	x965.37	34,430.65	10,602.73	6,592.80	118,175.53	253,405.21	6,841.49	2,660,762.02	144,348.53	x813.85	379,768.92
Hire of Equipment-Net.....	104,107.83	4,456.00	x11,582.06	x12,271.79	x18,072.14	x7,434.14	79,467.00	x769.26	x129,917.25	x128,467.12	x3,694.97	172,538.45
Joint Facility Rent-Net.....		150.00	x39.45			x1,568.75	x37,735.77		x494,268.11	50,583.34		x33,334.36
Net Railway Operating Income..	1,048,370.65	x5,271.37	22,809.14	x1,669.06	x11,479.34	109,172.64	295,136.44	6,072.23	2,036,576.66	66,464.75	x4,508.82	518,973.01

NOTE:----

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

INCOME ACCOUNT

YEAR ENDED JUNE 30, 1916.

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	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUM.RY. CO.	STATE UNIVERSITY RAILROAD	HPRA&S	YADKIN	ATLANTIC AND YADKIN	ROSWELL R.R.Co.	TENN. AND CAR.SOU.	SIEVERK AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME											
Railway Operating Revenue...	67,659,037.31	1,420,440.99	31,974.23	43,397.00	85,047.42	233,570.98	435,149.55	12,362.47	33,177.87	11,358.49	32,149.93
Railway Operating Expenses...	43,900,949.46	1,239,015.72	35,244.19	21,057.02	86,960.47	124,612.63	438,300.37	19,852.48	69,406.94	30,027.49	75,689.35
Net Rev. from Ry. Operations...	23,758,087.85	181,424.27	3,269.96	22,339.98	1,913.05	108,958.35	3,152.82	7,490.01	36,229.07	18,669.00	43,539.42
Railway Tax Accruals.....	2,834,076.39	31,402.59	2,422.16	546.87	5,315.45	4,118.97	27,277.08	1,554.96	3,856.44		5,856.04
Uncollectible Ry. Revenues...	34,982.02	825.73	10.54	17.25	36.57	89.93	137.87	7.84	7.19		12.44
# Railway Operating Income...	20,889,029.44	149,205.95	5,702.66	21,776.16	7,265.07	104,749.45	30,565.77	9,052.81	40,092.70	18,669.00	49,407.93
NON OPERATING INCOME											
Hire of Frt. Cars-Cr. Balance..											
Rent for Locomotives.....	125,516.83	91,250.00									
Rent from Pass. Train Cars....	178,166.33	41,975.00									
Rent from Floating Equipment..	796.00										
Rent from Work Equipment.....	48,907.80										
Jt. Facility Rent Income.....	281,384.37		7,985.77		1,297.10		27.83				
Income from Lease of Road.....	67,338.24										
Misc. Rent Income.....	136,225.82	1,205.00		5.00	111.82	194.26	761.77	114.24		20.50	
Misc. Non-Operating Phys. Prop..	24,077.44	139.60									
Separately Operated Pro-											
perties - Profit.....	1,326.09										
Dividend Income.....	1,271,256.09										
Income from Funded Securities...	1,105,959.53										
Income from unfunded S&A.....	480,129.88										
Income from Sinking and											
Other Reserve Funds.....	36,826.87										
Release of Premiums on											
Funded Debt.....											
Contributions from Other Cos...											
Miscellaneous Income.....	336.94										
Total Non-Operating Income...	3,758,248.23	134,250.40	7,985.77	5.00	1,408.92	194.26	808.20	114.24		20.50	
Gross Income.....	24,647,277.67	283,496.35	2,283.11	21,781.16	8,673.99	104,943.71	31,373.97	9,167.05	40,092.70	18,689.50	49,407.90
DEDUCTIONS FROM GROSS INCOME											
Hire of Frt. Cars-Dr. Balance..	666,595.88	27,567.90	25,000.90	9,528.50	32,498.60	47,909.60	9,347.85	10,616.45	9,261.00	10,939.70	2,348.55
Rent for Locomotives.....		112,890.00									11,970.00
Rent for Pass. Train Cars....	158,123.84	18,010.00									3,640.00
Rent for Work Equipment.....	9,328.78										
Jt. Facility Rents.....	917,480.54	136,422.53					337.50				
Rent for Leased Roads.....	1,814,724.21										
Miscellaneous Rents.....	40,663.98	852.64									
Separately Operated Proper-											
ties - Loss.....	190,643.94										
Miscellaneous Tax Accruals...											
Interest on Funded Debt.....	10,865,637.50	139,850.00	21,920.00		36,558.38	93,094.19	60,000.00	6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt...	115,206.92										
Amortization of Discount on											
Funded Debt.....											
Maintenance of Invest. Organs...	11,242.72										
Income transf. to Other Cos...											
Misc. Income Charges.....	25,523.43										
Total Deductions from G.I.	14,815,561.74	436,593.07	46,920.90	9,528.50	69,056.98	141,003.79	89,885.35	17,366.45	83,421.00	10,939.70	55,038.55
Net Income.....	9,831,715.93	152,096.72	44,637.79	2,252.66	74,913.13	36,960.38	99,442.92	26,305.02	103,513.70	29,588.20	114,446.45

To reflect Railway Operating Income on the same basis as used in the Act of March 21, 1916, whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be the annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income...	20,889,029.44	149,205.95	5,702.66	21,776.16	7,265.07	104,749.45	30,565.77	9,052.81	40,092.70	18,669.00	49,407.90
Hire of Equipment-Net...	481,051.54	25,242.90	25,000.90	9,528.50	32,498.60	47,909.60	9,347.85	10,616.45	9,261.00	10,939.70	17,958.55
Joint Facility Rent-Net...	636,096.17	136,422.53	7,985.77		1,297.10		309.67				
Net Railway Operating Income.....	19,771,881.73	12,459.48	22,717.79		38,486.57		40,223.29	19,669.26	49,353.70	29,608.70	67,366.45

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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INCOME ACCOUNT

YEAR ENDED JUNE 30, 1916.

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	A.G.S.	A.&C.MTN.	BLUE RIDGE	CUMB.RR.	D. & W.	G.S. & F.	HARTWELL	M. & O.	NOR. ALA.	TALL.FALLS.	V. & S.W.
OPERATING INCOME											
Railway Operating Revenue.....	5,641,401.69	9,080.96	202,329.35	62,038.54	369,268.14	2,445,408.43	23,673.75	11,868,037.78	668,623.92	117,546.43	1,959,706.00
Railway Operating Expenses.....	3,761,382.92	7,724.64	140,495.72	41,914.23	195,059.40	1,833,852.86	18,726.82	8,533,736.58	388,115.53	101,381.41	1,461,964.00
Net Rev. from Ry.Operations....	1,880,018.77	1,356.32	61,833.63	20,124.31	174,208.74	611,555.57	4,946.93	3,334,301.20	280,508.39	16,165.02	497,742.00
Railway Tax Accruals.....	198,420.33	267.09	7,597.78	563.72	15,766.77	137,075.33	772.83	406,384.00	32,524.80	6,101.62	85,428.00
Uncollectible Railway Revenues..	297.35		4.64			3,425.70	1.60	2,716.80	24.44	1.09	71.00
# Railway Operating Income.....	1,681,301.19	1,089.23	54,231.21	19,560.59	158,441.97	471,054.54	4,172.50	2,925,200.40	247,959.15	10,057.31	412,242.00
NON OPERATING INCOME											
Hire of Frt.Cars.Gr.Balance....	203,110.66					72,244.48		186,760.71			235,128.00
Rent from Locomotives.....											1,211.00
Rent from Train Cars.....										129.57	621.00
Rent from Floating Equipment...											
Rent from Work Equipment.....											
Jt.Facility Rent Income.....	52,710.93	150.00	69.23			10,250.66		40,760.63	54,360.20	97.72	5,639.00
Income from Lease of Road.....											
Misc. Rent Income.....			904.57		200.00	4,125.68	60.00	5,155.03	83.30	72.00	1,604.00
Misc.Non-Operating Phys.Prop...						333.65			170.20		1,045.00
Separately Operated Proper-											
ties - Profit.....											
Dividend Income.....						8,650.00					
Income from Funded Securities..	120,333.56					750.00					
Income from Unfunded S&A.....					613.08	7,341.61		14,548.04	107.72		1,733.00
Income from Sinking and Other..											
Reserve Funds.....											
Release of Premiums on											
Funded Debt.....											
Contributions from Other Cos...											
Miscellaneous Income.....	7,759.42							10,065.81			
Total Non-Operating Income....	383,914.57	150.00	973.80		813.08	103,696.08	60.00	257,290.22	54,721.42	299.29	246,982.00
Gross Income.....	2,065,215.76	1,239.23	55,205.01	19,560.59	159,255.05	574,750.62	4,242.50	3,182,490.62	302,680.57	10,356.60	659,224.00
DEDUCTIONS FROM GROSS INCOME											
Hire of Frt.Cars-Dr.Balance....			12,645.98	11,579.14	9,972.27		669.60		77,751.26	1,513.22	
Rent for Locomotives.....			805.08				277.22		43,657.96		2,003.00
Rent for Pass.Train Cars.....			2,094.96		61.81		205.60		4,955.90		2,396.00
Rent for Work Equipment.....			8.78						285.36	1.58	
Jt.Facility Rents.....	97,870.11		240.00		1,568.75	45,516.23		558,573.17	633.29	835.80	14,105.00
Rent for Leased Roads.....	18,102.80		4,000.00								10,000.00
Miscellaneous Rents.....				62.54	134.44				360.00	60.00	
Separately Operated Proper-											
ties - Loss.....	131,302.60										
Miscellaneous Tax Accruals.....						472.12					
Interest on Funded Debt.....	354,389.83		7,850.00	16,911.96	102,565.95	294,940.00	1,000.00	1,520,740.84	95,480.36	75,950.00	399,665.00
Interest on Unfunded Debt.....		226.41	.47		909.51	13,210.11		67,462.07		376.67	7.00
Ameritization of Discount on											
Funded Debt.....	2,703.08										
Maintenance of Invest.Organz...											
Income transf. to Other Cos....											
Misc. Income Charges.....	489.55					871.03		182,584.52			1,959.00
Total Deductions from G.Inc..	604,857.97	226.41	27,645.27	28,553.64	115,212.73	354,964.49	2,152.42	2,329,360.80	223,124.13	78,737.27	430,135.00
Net Income.....	1,460,357.79	1,012.82	27,559.74	18,993.05	44,042.32	219,766.13	2,080.08	853,130.02	79,556.44	168,380.67	229,089.00

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.....	1,681,301.19	1,089.23	54,231.21	19,560.59	158,441.97	471,054.54	4,172.50	2,925,200.40	247,959.15	10,057.31	412,242.00
Hire of Equipment-Net.....	203,110.66		15,554.80	11,579.14	10,034.08	72,244.48	1,152.42	186,760.71	126,650.48	1,385.23	232,561.00
Jt.Facility Rent-Net.....	145,159.18	150.00	170.77		1,568.75	132,265.57		1,812.54	53,726.91	1,738.08	18,466.00
Net Railway Operating Income...	1,839,252.67	1,239.23	38,505.64	7,981.45	146,839.14	508,033.45	3,020.08	2,594,148.57	175,035.58	7,934.00	636,337.00

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy

I N C O M E A C C O U N T

YEAR ENDED JUNE 30, 1917.

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	SOU.RY.CO.	SOU.RY.CO. IN KEN.	CUMB.RY.CO.	STATE UNIVERSITY RAILROAD	ROSEWELL RAILROAD COMPANY	TENN. AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
<u>OPERATING INCOME</u>								
Railway Operating Revenues...	79,318,336.22	1,824,733.55	36,264.50	40,890.17	13,234.61	114,080.01	13,974.04	26,811.87
Railway Operating Expense....	51,864,796.02	1,472,051.89	39,146.01	26,583.63	20,152.78	86,331.73	29,096.42	91,977.68
Net Rev.from Ry.Operations...	27,453,540.20	352,681.66	*2,881.51	14,306.54	*6,918.17	27,748.28	*15,122.38	*65,165.81
Railway Tax Accruals.....	3,342,162.58	37,829.47	2,664.26	659.12	1,587.37	2,697.85	1,146.11	5,677.38
Uncollectible Ry.Revenues....	31,350.92	819.91	11.29	16.09	5.15	31.57	3.25	73.19
#Railway Operating Income.....	24,080,026.70	314,032.28	*5,557.06	13,631.33	*8,510.69	25,018.86	*16,271.74	*70,916.38
<u>NON-OPERATING INCOME</u>								
Hire of Frt.Cars-Cr.Bal.....	223,796.08							
Rent from Locomotives.....		91,250.00						
Rent from Pass.Train Cars....		41,975.00						
Rent from Work Equipment.....								
Jt.Facility Rent Income.....	294,954.29							
Income from Lease of Road....	18,897.78							
Miscellaneous Rent Income....	138,295.72	2,609.00	8.64	5.00	35.00		36.90	
Misc.Non-Operating								
Physical Property.....	36,343.65	*143.94		*1.95				
Separately Operated Prop.....								
Dividend Income.....	1,220,890.33							
Income from Funded Securts...	950,381.90							
Income from Unfunded S&A.....	364,306.55							
Income from Sinking and								
Other Reserve Funds.....								
Release of Premiums on								
Funded Debt.....								
Contributions from Other								
Companies								
Miscellaneous Income	32,023.37							
Total Non-Operating Income..	3,279,891.67	135,690.06	8.64	3.05	35.00		36.90	
Gross Income.....	27,359,918.37	449,722.34	*5,548.42	13,634.38	*8,475.69	25,018.86	*16,234.84	*70,916.38
<u>DEDUCTIONS FROM GROSS INCOME</u>								
Hire of Frt.Cars-Dr.Balance..	93,397.52	72,617.75	22,636.70	10,057.65	10,143.05	20,663.90	8,188.00	14,569.75
Rent for Locomotives.....		115,500.00						
Rent for Pass.Train Cars....		17,445.00						
Rent for Work Equipment.....								
Joint Facility Rents.....	923,808.46	129,618.87	3,406.64					
Rent for Leased Roads.....	1,939,066.63							
Miscellaneous Rents.....	50,179.48	993.80						
Separately Operated Prop-Loss	464,695.83							
Interest on Funded Debt.....	11,383,215.02	139,850.00	21,920.00		6,750.00	54,160.00		47,080.00
Interest on Unfunded Debt....	70,033.26							
Amortization of Discount								
on Funded Debt.....								
Maintenance of Invest.Organs.								
Income transfd.to other Cos..								
Misc. Income Charges.....	128,562.87							
Total Deductions from G.Inc.	14,959,561.55	476,025.42	47,983.34	10,057.65	16,893.05	74,823.90	8,188.00	81,649.75
Net Income.....	12,400,356.82	*26,303.08	*53,511.76	3,576.73	*25,368.74	49,805.04	*24,422.84	*132,566.13

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income....	24,080,026.70	314,032.28	*5,557.06	13,631.33	*8,510.69	25,018.86	*16,271.74	*70,916.38
Hire of Equipment - Net.....	223,796.08-R	*72,337.75	*22,636.70	*10,057.65	*10,143.05	*20,663.90	*8,188.00	*14,569.75
Jt.Facility Rent - Net.....	*628,854.17	*129,618.87	*3,406.64					
Net Railway Operating Income	23,674,968.61	112,075.66	*31,600.40	3,573.68	*18,653.74	4,354.96	*24,459.74	*85,486.13

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

* Denotes Red in Copy

I N C O M E A C C O U N T

YEAR ENDED JUNE 30, 1917.

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EXHIBIT B

	A.G.S.	A. & Y.	A. & C.Mtn	BLUE RIDGE	CUMB.R.R.	C. & T.S.	D. & W.	G.S. & F.	HARTWELL	H.P.R.A. & S.	M. & O.	N.C. & N.E.	NOR. ALA.	TALL FALLS	YADKIN
OPERATING INCOME															
Railway Operating Revenues.....	6,337,923.78	483,650.36	12,656.70	223,218.41	45,676.28	21,243.84	388,122.69	2,797,563.17	25,845.02	100,959.07	12,859,865.67	4,403,622.42	792,047.48	131,068.16	358,712.33
Railway Operating Expenses.....	4,114,675.32	435,281.34	17,262.62	147,617.80	39,956.80	15,762.02	216,962.28	2,106,780.08	19,224.45	91,309.28	9,578,197.71	2,865,945.69	457,317.36	109,152.46	195,580.94
Net Rev. from Ry. Operations.....	2,223,248.46	48,369.02	44,605.92	75,600.61	5,719.48	5,481.82	171,150.41	690,783.09	6,620.57	9,649.79	3,281,667.96	1,537,676.73	334,730.12	21,915.70	163,131.39
Railway Tax Accruals.....	253,618.25	24,834.87	318.56	8,007.69	685.25	420.99	17,622.61	137,340.07	652.37	4,903.69	524,684.98	257,398.41	34,288.19	5,885.19	3,673.52
Uncollectible Ry. Revenues.....	356.25	74.67		12.50			16.25	1,400.55	16.37	12.88	2,025.70	1,125.30	5.94	83.34	7.23
# Railway Operating Income.....	1,969,273.96	23,459.48	44,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,733.22	2,754,957.28	1,279,153.02	300,435.99	15,947.17	159,450.64
NON-OPERATING INCOME															
Hire of Frt. Cars-Cr. Balance.....	489,303.34							219,751.70			931,371.12	121,104.60			
Rent from Locomotives.....	9,731.19	2,145.12		320.00				10,227.40		423.32		6,181.32	2,219.23	285.00	6,155.29
Rent from Pass. Train Cars.....	56,152.72	489.06		820.74			8 .48	26,504.87		111.66		32,908.10		272.70	348.72
Rent from Work Equipment.....	17,796.27	148.32						2,075.08				880.36	1,421.16	3.98	175.49
Jt. Facility Rent Income.....	51,374.23	4.89	150.00	113.30		1.25		11,584.12		1,050.00	40,017.52	83,761.96	52,760.84	51.24	
Income from Lease of Rent.....															
Miscellaneous Rent Income.....	292.95	780.66		999.36	307.94	90.00	160.92	5,111.20	118.29	171.06	16,286.35	593.64	69.20	82.00	165.22
Misc. Non-Operating Phys. Prop.....	1,323.59				x144.30			1,986.28					245.83		
Separately Operated Properties.....															
Dividend Income.....	121,890.89							2,636.63							
Income from Funded Securities.....	9.60							750.00							
Income from Unfunded S. & A.....	18,419.30						v 613.04	9,451.05			19,890.51	44,193.23	109.47		
Income from Sinking & Other															
Reserve Funds.....	184.91				209.45										
Release of Premiums on Funded Debt															
Contributions from Other Cos.....												43,998.88			
Miscellaneous Income.....	1,832.50						35.00	1.00			49,486.11	3.20			
Total Non-Operating Income.....	768,312.49	3,568.05	150.00	2,253.40	373.09	91.25	817.44	290,079.73	118.29	1,756.04	1,057,051.61	334,425.29	56,823.73	694.92	6,844.72
Gross Income.....	2,737,586.45	27,027.53	44,774.48	69,833.82	5,407.32	5,152.08	154,328.99	842,121.80	6,070.12	6,489.26	3,812,008.89	1,613,578.31	357,261.72	16,642.09	166,295.36
DEDUCTIONS FROM GROSS INCOME															
Hire of Frt. Cars-Dr. Balance.....		45,851.59	192.00	11,931.09	12,583.57	5,965.37	120.69		1,161.30	12,983.33			83,237.67	2,495.04	27,880.07
Rent for Locomotives.....	7,971.84	10,920.54		788.08		2,461.50		38.71	192.00	3,616.36		9,806.05	53,050.97		7,684.32
Rent for Pass. Train Cars.....	55,449.46	10,250.79		2,533.33		92.33	54.20	24,750.73	1.20	1,013.96		39,198.17	4,661.32	280.27	3,133.46
Rent for Work Equipment.....	580.39	865.49		56.00				13.00		313.50		1,280.61	1,982.36	11.18	1,221.05
Joint Facility Rents.....	109,549.56	672.89		240.00		31.92	1,569.25	50,223.04			584,017.77	104,883.66	x36.47	413.20	
Rent for Leased Roads.....	18,206.40			4,000.00											
Miscellaneous Rents.....	157.00				62.64		25.00						430.00	60.00	
Separately Operated Prop.-Loss.....	139,632.42														
Interest on Funded Debt.....	400,434.77	60,000.00		5,000.00	51,399.96	27,720.00	52,600.00	312,025.72	1,000.00	24,120.00	1,531,884.86	394,336.68	82,500.00	75,950.00	36,900.00
Interest on Unfunded Debt.....		106.24	226.42	2,136.91		14.32	53,157.23	11,502.50		20,666.76	29,586.37	9,578.97	23,652.67	1.65	65,972.01
Amortization of Discount on															
Funded Debt.....							93.70					2,773.92			
Maintenance of Invest. Organiztn.....															
Income transfd. to other Cos.....															
Miscellaneous Income Charges.....	32.30	568.60			36.88			1,815.53			184,115.51	183.41			
Total Deductions from G. Inc.....	732,014.14	129,236.14	418.42	26,685.41	64,083.05	36,285.44	107,620.07	400,369.23	2,354.50	62,713.91	2,329,604.51	562,041.47	249,478.52	79,211.34	142,790.91
Net Income.....	2,005,572.31	24,791.39	44,356.06	43,148.41	4,924.27	4,866.64	46,708.92	441,752.57	3,715.62	5,775.35	1,482,404.38	1,051,536.84	107,783.20	x62,569.25	23,504.45

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.....	1,969,273.96	23,459.48	44,924.48	67,580.42	5,034.23	5,060.83	153,511.55	552,042.47	5,951.83	4,732.22	2,754,957.28	1,279,153.02	300,435.99	15,947.17	159,450.64
Hire of Equipment - Net.....	508,982.83	x65,105.91	x192.00	x14,167.76	x12,583.57	x8,519.20	x166.41	233,756.61	x1,354.50	x17,392.17	931,371.12	110,789.55	x139,291.93	x2,224.81	x33,239.40
Joint Facility Rent - Net.....	x58,174.33	x668.00	150.00	x126.70		x30.67	x1,569.25	x38,638.92		1,050.00	x544,000.25	x21,121.70	52,797.31	x361.96	
Net Railway Operating Income.....	2,420,082.46	x42,314.43	x4,966.48	53,285.96	x7,549.34	x3,489.04	151,775.89	747,160.16	4,597.33	x11,608.95	3,142,328.15	1,368,820.87	213,941.37	13,360.40	126,211.24

NOTE----
The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.
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YEAR ENDED DECEMBER 31, 1918.

EXHIBIT B

	SOUTHERN	SOU. RY. CO. IN KEN.	CUMB. RY. CO.	STATE UNIVERSITY RAILROAD	ROSWELL RAILROAD COMPANY	TENN. AND CAR. SOU.	SIEVERN AND KNOXVILLE	ENSLEY SOUTHERN
OPERATING INCOME								
Railway Operating Revenues.....	123,579,934.81	2,594,978.47	43,485.79	46,428.36	28,479.46	208,828.29	14,675.69	57,485.98
Railway Operating Expenses.....	88,831,129.21	2,573,379.08	77,213.88	38,067.90	40,158.00	91,628.77	41,358.03	117,490.21
Net Revenue from Ry. Operations.	34,748,805.60	21,599.39	33,271.91	8,360.46	11,678.54	117,199.52	26,682.34	60,004.22
Railway Tax Accruals.....	3,683,359.53	40,844.27	3,087.26	641.54	1,635.09	2,255.77	975.09	9,365.73
Uncollectible Railway Revenues...	43,862.79	1,098.94	16.01	38.34	8.62	52.46	13.02	12.69
# Railway Operating Income.....	31,021,583.28	20,343.32	36,811.36	7,680.58	12,322.25	114,891.29	27,670.45	69,382.65
NON-OPERATING INCOME								
Hire of Frt. Cars-Cr. Balance.....								
Rent from Locomotives.....	694,723.99							
Rent from Passenger Train Cars...	161,800.11							
Rent from Floating Equipment.....	3,215.31							
Rent from Work Equipment.....	43,704.56							
Joint Facility Rent Income.....	270,558.26	96.39	17,251.50					
Income from Lease of Road.....								
Miscellaneous Rent Income.....								
Misc. Non-Operating Phys. Prop.								
Separately Operated Proper-								
ties - Profit.....								
Income from Funded Securities....	2,177.09							
Income from Unfunded S. & A.	220,061.20							
Income from Sinking and Other								
Reserve Funds.....								
Release of Premiums on P. Debt...								
Miscellaneous Income.....	1,312,716.54	96.39	17,251.50					
Total Non-Operating Income.....	2,708,956.46							
Gross Income.....	33,730,539.74	20,246.43	19,559.86	7,680.58	13,322.25	114,891.29	27,670.45	69,382.65
DEDUCTIONS FROM GROSS INCOME								
Hire of Frt. Cars-Debit Balance...	274,011.19	431,246.00	20,007.60	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Rent for Locomotives.....	603,245.77							
Rent for Passenger Train Cars....	286,918.41							
Rent for Floating Equipment.....								
Rent for Work Equipment.....	13,718.86							
Joint Facility Rents.....	1,015,665.28	153,697.61	11,607.26					
Rent for Leased Roads.....								
Miscellaneous Rents.....								
Miscellaneous Tax Accruals.....								
Separately Operated Proper-								
ties - Loss								
Interest on Funded Debt.....								
Interest on Unfunded Debt.....	1,981.29							
Amortization of Discount on								
Funded Debt.....								
Income Transfd. to Other Cos.....								
Miscellaneous Income Charges.....	465,128.62							
Total Deductions from Gross Inc.	2,660,669.42	584,943.61	31,614.86	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Net Income.....	31,069,870.32	605,191.04	51,174.74	1,327.22	21,194.05	88,686.89	35,120.85	84,835.25

To reflect the Railway Operating Income on the same basis as used in the Act of March 21, 1918 whereby the railways were taken under Federal Control; such Act providing the basis for compensation to be Annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income.....	31,021,583.28	20,343.82	36,811.36	7,680.58	13,322.25	114,891.29	27,670.45	69,382.65
Hire of Equipment.-Net.....	274,450.06	431,246.00	20,007.60	9,007.80	7,871.80	26,204.40	7,450.40	15,452.60
Joint Facility Rent - Net.....	745,107.02	153,601.22	5,644.23					
Net Railway Operating Income.....	30,002,026.20	605,191.04	51,174.74	1,327.22	21,194.05	88,686.89	35,120.85	84,835.25

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

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I N C O M E A C C O U N T
YEAR ENDED DECEMBER 31, 1918.

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	A. G. A.	A. & Y.	A. & C. Mtn.	BLUE RIDGE CUMBERLAND R.R.	C. & T. S.	D & W	G. S. & F.	HARTWELL	H. P. R. A. & S.	M & O.	N. O. & N. E.	TALL. FALLS.	YADKIN	NOR. ALA.
OPERATING INCOME														
Railway Operating Revenue...	9,296,634.94	614,031.54	10,507.67	278,411.50	22,854.05	467,714.28	3,594,800.98	33,378.39	114,340.42	14,840,901.48	6,474,717.62	155,194.57	291,652.96	1,404,881.65
Railway Operating Expense...	7,103,514.85	663,629.41	16,380.84	248,857.47	23,580.54	371,523.09	3,249,537.79	31,206.17	121,302.76	14,131,172.23	5,192,415.21	173,908.81	278,451.86	979,146.09
Net Rev. from Ry. Operations...	2,193,120.09	x49,597.87	x5,973.17	29,554.03	x728.49	96,191.19	445,263.19	2,172.22	x6,962.34	709,729.25	1,282,302.41	x17,714.24	13,201.10	425,735.56
Railway Tax Accruals.....	264,596.47	25,734.85	335.00	8,793.48	541.39	17,412.24	171,429.34	921.21	5,127.67	525,234.00	309,590.95	6,401.01	4,795.22	48,370.07
Uncollectible Ry. Revenues...	3,110.90	747.52		16.90	1.50		920.74		7.34	2,248.81	609.77	x24,115.25	36.32	14.00
# Railway Operating Income...	1,925,412.72	x77,080.24	x6,208.17	20,743.65	x1,269.38	78,778.95	272,913.11	1,251.01	x12,097.35	182,246.44	597,101.69		8,369.56	377,351.49
NON-OPERATING INCOME														
Hire of Frt. Cars-Cr. Balance...	140,069.04					2,407.37	91,276.13			206,800.88	64,880.23			
Rent from Locomotives.....	50,544.08	2,911.64					31,456.85			87,565.52	29,248.79			
Rent from Passenger Train Cars	38,332.48						13,320.11			18,605.88	11,662.85		10,623.92	9,882.52
Rent from Floating Equipment										16,126.45	3,365.03			
Rent from Work Equipment	4,753.20						4,135.75							
Joint Facility Rent Income..	51,865.35	184.09	150.00	80.10			13,203.84			46,153.45	121,255.71	30.99		1,103.64
Income from Lease of Road...														44,278.41
Miscellaneous Rent Income...										17.90				
Misc. Non-Operating Phys. Prop.										605.72	14,807.64			
Separately Operated Proper-														
ties - Profit.....							40.00							
Income from Funded Securities														
Income from Unfunded S. & A...	24,315.17	272.07	23.74	408.87	9.75	1,021.34	3,861.92	105.51	113.17	7,091.77	49,189.68	102.39	456.71	294.83
Income from Sinking & Other														
Reserve Funds.....														
Release of Premiums on F&Bt.														
Miscellaneous Income.....	131,755.18	8,070.09		3,597.22	339.56	5,432.88	27,067.93	383.65	1,760.80	72,411.09	3,310.97		6,109.81	9,481.87
Total Non-Operating Income...	441,634.50	11,445.89	173.74	4,086.19	349.31	9,861.59	184,362.53	489.16	1,873.97	455,378.66	294,410.13	3,444.35	17,190.44	55,041.27
Gross Income.....	2,367,047.22	x65,634.35	x6,034.43	24,824.84	x920.07	88,640.54	457,275.64	1,740.17	x10,223.38	637,625.10	1,266,511.82	x20,670.90	25,560.00	442,392.76
DEDUCTIONS FROM GROSS INCOME														
Hire of Ft. Cars-Debit Balance		21,090.81		3,095.24	1,424.56			936.66	4,822.00					
Rent for Locomotives.....	29,955.23	41,798.00	656.00	1,751.08	3,275.22			229.00	10,876.13	5,291.08	99,508.05	792.46	9,221.87	109,795.08
Rent for Passenger Train Cars	38,863.69	7,127.29		1,881.21	60.34	5.02	4,463.81		511.61	14,909.55	31,587.53		23,728.12	123,190.08
Rent for Floating Equipment...												3.36	1,826.41	4,271.78
Rent for Work Equipment.....	1,865.45	277.42				465.50			113.00	4,352.74	1,053.04			
Joint Facility Rent.....	101,821.86	418.71		240.00	30.47	1,569.25	61,117.18			285,577.07	94,926.13		89.50	3,011.39
Rent for Leased Roads.....												420.89		100.21
Miscellaneous Rents.....										144.07				
Miscellaneous Tax Accruals...														
Separately Operated														
Properties - Loss.....										11,042.56				
Interest on Funded Debt.....														
Interest on Unfunded Debt....														
Amortization of Discount on														
Funded Debt.....														
Income Transferred to other Cos.														
Miscellaneous Income Charge..	79,255.16	5,013.89	3.10	x1,768.66	x276.37		3,436.42	x37.15	x816.47		27,651.17			
Total Deductions from										48,791.72		x269.09		15,864.77
Gross Income.....	251,761.39	75,726.12	659.10	5,198.87	4,514.22	1,546.28	81,881.39	1,128.50	15,506.27	370,108.79	254,725.95			
Net Income.....	2,115,285.83	x141,360.47	x5,693.53	19,630.97	x5,434.29	87,094.26	375,394.25	611.67	x25,729.65	267,516.31	1011,785.87	947.62	34,865.90	256,233.31
										267,516.31	1011,785.87	x21,618.52	x9,305.90	166,159.45

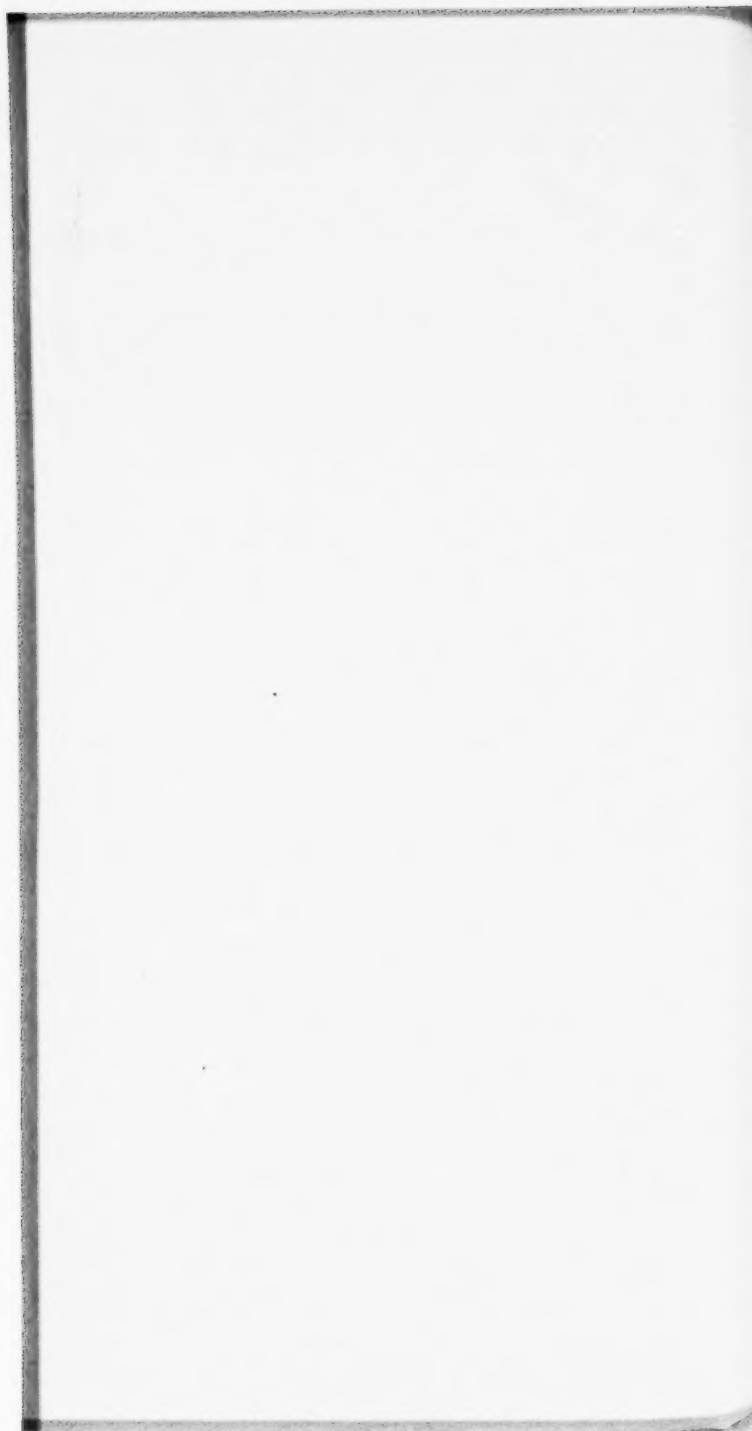
To reflect the Railway Operating Income on the same basis as used in the Acts of March 21, 1918 whereby the railroads were taken under Federal Control; such Act providing the basis for compensation to be annual Railway Operating Income in the computation of which debits and credits arising from the accounts "Equipment Rents" and "Joint Facility Rents" shall be included, we have the following:

Railway Operating Income...	1,925,412.72	x77,080.24	x6,208.17	20,743.65	x1,269.38	78,778.95	272,913.11	1,251.01	x12,097.35	182,246.44	597,101.69			
Hire of Equipment - Net...	163,014.43	x67,381.88	x656.00	x6,727.53	x5,760.02	2,036.85	122,861.05	x1,155.66	x15,322.74	x304,545.36	x22,991.72	x24,115.25	8,369.56	377,351.49
Joint Facility Rent - Net...	x49,956.51	x234.62	150.00	x159.90	30.47	x1,569.25	x47,313.34			x239,423.62	26,329.55	x795.82	x24,241.88	x229,282.17
Net Railway Operating Income.....	2,038,470.64	x144,696.74	x6,714.17	13,856.22	x6,050.37	79,246.55	357,860.82	65.35	x28,420.09	247,366.18	975,439.52	x25,300.97	x15,972.32	192,247.52

NOTE---

The foregoing results are stated in accordance with the classifications prescribed by the Interstate Commerce Commission in its Annual Reports.

x Denotes Red in Copy



[fol. 211]

IN COURT OF APPEALS

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Kentucky, Appellant,

vs.

SOUTHERN RAILWAY COMPANY and JOHN BARTON PAYNE, Director
General of Railroads, as Agent, under Sec. 205 of the Transportation
Act of 1920, Appellees

STATEMENT OF APPEAL

The judgment appealed from was rendered on March 12, 1921,
and is found on pages 63-64 of the record.

Appeal granted below. No process is necessary. Counsel for ap-
pellees, Wallace & Harriss, Versailles, Ky., and Humphrey, Craw-
ford & Middleton, Louisville, Ky.

L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for
appellant.

[fol. 211a]

IN COURT OF APPEALS

EXHIBITS

"B"

(Here follow income statements marked side folio pages 212, 213,
214, 215, 216, 217, 217a, 217b, 217c, 217d)

[fol. 218]

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER SETTING CASES—Sept. 19, 1921

Came appellee by Counsel and filed motion for an oral argument.
Which motion is submitted.

Afterwards at a Court of Appeals held in and for the Common-
wealth of Kentucky, as aforesaid, on the 21st day of September,
1921, the following order was entered to-wit:

Commonwealth of Kentucky, on Relation, etc. v. Southern Rail-
way Co.—Woodford.

Commonwealth of Kentucky on Relation, etc. v. Southern Rail-
way Co., Woodford.

The Court being sufficiently advised, it is considered that ap-
pellee's motion for an oral argument be and the same is hereby sus-
tained, and said cases are set for hearing on October 21st, 1921.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ARGUMENT AND SUBMISSION—Oct. 21, 1921

These appeals coming on to be heard, were argued orally by [fol. 219] Charles W. Milner for the appellee, and J. P. Hopson, for the appellants and submitted.

IN COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on Relation of ROBERT HAWKINS,
Sheriff, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee,

and

COMMONWEALTH OF KENTUCKY, on Relation of ROBERT HAWKINS,
Sheriff, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee

JUDGMENT—Nov. 18, 1921

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that the judgment in each case be reversed, and cause remanded for proceedings, not inconsistent with the opinion herein, which is ordered to be certified to the said court.

It is further considered, that the appellant recover of the appellee, its costs herein expended.

[fol. 220] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—Nov. 18, 1921

Judge THOMAS:

The Commonwealth of Kentucky on relation of Robert Hawkins, [fol. 221] Sheriff of Woodford County, filed two statements in the County Court of that county under the authority given by section 4241 of the Statutes by which it was sought to list for taxation as omitted property, for the years 1914-1918, both inclusive, the pro-

portionate part of the intangible property of defendant, Southern Railway Company, that it alleged, owned and controlled lines in Kentucky bore to its owned and controlled lines constituting its entire railway system. The statement seeking the relief for the years 1914, 1915 and 1916 was filed against Southern Railway Company alone, and the one seeking the same relief for the years 1917 and 1918 joined with the company the Director General of Railroads, who for those two years operated defendants's railway system under the Federal Control Act. The facts governing the right to assess the property for each of the years are the same, and the two statements were heard and disposed of in the courts below as one case. [fol. 222] In each statement it was averred in substance that defendant Southern Railway Company, which is a Virginia Corporation, owned, operated and controlled in round numbers, one hundred and twenty seven (127) miles of railroad in Kentucky, running from the city of Louisville, in Jefferson County, to Danville, in Boyle County, with branches running to Versailles, Georgetown, Lexington and perhaps other points, but which were ostensibly owned and operated by a Kentucky corporation known as "Southern Railway Company in Kentucky"; that it so owned, operated and controlled thirty eight and a fraction miles of railroad trackage in Kentucky, ostensibly owned and operated by the Mobile and Ohio Railroad Company; that it likewise owned, operated and controlled one and three fourths ($1\frac{3}{4}$) miles of railroad in Bell County, ostensibly operated in the name of Cumberland Railway Company, and also owned, operated and controlled 12.9 miles of railroad in Knox County, Kentucky ostensibly owned and operated by the Cumberland Railroad Company; and that defendant entirely omitted to make any report to the Auditor of Public Accounts of the State for [fol. 223] either of the years involved as is required by the provisions of section 4078 of the Statutes, as a basis for the assessment of Kentucky's portion of its intangible property and that none of said property had been assessed except that which was assessed to, and paid by, the ostensibly owning corporation as before mentioned, and which amounts so assessed and paid were not the true ones to which the State was entitled.

The answer to each statement denied the material allegations therein and affirmatively alleged the assessment and payment of the local franchise taxes due from the various divisional units of railroad lines referred to, as a bar to any right of recovery. Appropriate pleadings made the issues and upon submission the County Court dismissed each proceeding, from which the Commonwealth by the Sheriff, its relator, procured an appeal to the Woodford Circuit Court and a similar judgment was rendered by that court in each case, to reverse which these appeals have been brought to this court and by agreement are heard together.

[fol. 224] There were searching interrogatories attached to each statement which were unreservedly answered by the defendant, and those answers, including the exhibits filed therewith, and an agreed stipulation signed by the parties, furnished the facts upon which

both the County and the Circuit Court based their respective judgments, and which facts must also govern us in the disposition of these appeals. We will defer a consideration of the facts for the moment while we briefly notice the law in Kentucky with reference to taxing intangible property of corporations, both foreign and domestic, and the methods pointed out therein by which the value of such property has a taxing situs within the taxing authority for such purposes, may be ascertained and assessed.

Prior to the original enactment of sections 4077-4091, both inclusive of the Kentucky Statutes, being sub-division 1 of article 4 of Chapter 108, corporations neither assessed nor paid any franchise tax, which, it has been held, is but another name for intangible property. The only property upon which taxes were assessed and paid prior to that time was tangible property. It was discovered, not only [fol. 225] in Kentucky but elsewhere, that in addition to their tangible property many corporations, because of the use of such property in the manner permitted by the sovereignty creating it or under whose permission it operated locally outside of the State of their creation, increased the total value of their property largely in excess of their tangible property, which excess grew out of the privileges conferred in the use of its tangible property, and such excess valuation is referred to in the books, sometimes as the corporations' franchise, but it is now come to be more generally designated as intangible property, and is universally regarded and held to be a legitimate subject of taxation. The class of corporations which the Statutes make liable for taxes on its intangible property are set forth in section 4077 of our Statutes, in this language: "Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other [fol. 226] like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised."

In order to enable the assessment board to properly value the franchise, or the intangible property subject to taxation in this State, section 4078 of our Statutes requires all corporations subject to the payment of the tax to file a report between the thirtieth day of June and the first day of October of each year with the Auditor of Public Accounts setting forth the facts therein stated, and if the corporation is a common carrier with lines extending beyond the confines of this State, section 4079 requires the statement of additional facts in such reports among which are "the length of entire lines operated, owned, leased or controlled in this State, and in each county, in [fol. 227] incorporated city, town or taxing district, and the entire line

operated, controlled, leased or owned elsewhere." The latter section also required that the corporations referred to therein shall also report "the gross and net income or earning received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made." The two following sections, 4080 and 4081, furnish formulas to guide the assessing board in arriving at the true value of the intangible property subject to taxation in this State. Since the enactment of the sections referred to, all corporations coming within their purview have made the required reports to the Auditor of Public Accounts and have been assessed and have paid the taxes on the due proportion of their intangible property, which, under the Statutes, has a taxable situs in this State; and it is admitted by the defendant that if it was doing business as a common carrier in this State it [fol. 228] would be subject to the franchise tax provided by the sections of the statute or to the payment of taxes on its proportion of intangible property in Kentucky. But it insists that it did not make the report required by the Statute to the Auditor of Public Accounts, and that it is not liable for any franchise tax or taxes on any intangible property sought to be assessed because it does not now nor has it ever exercised "any special or exclusive privileges or franchise not allowed by law to natural persons" in Kentucky; that the only business which it does in Kentucky is to maintain an office for the purpose of soliciting freight and other business for its railroad system out of Kentucky, which is not the exercise of such a privilege as subjects it to the character of taxes sought to be recovered, and that the business which is performed in Kentucky, under the character of special privilege mentioned, is conducted solely by other corporations which are separate and distinct from it and wholly independent of it. The Commonwealth on the other hand insists that the conducting of the business in Kentucky by the other corporations referred to is in name only, and that in reality that business is conducted and the privilege to do so is exercised by the defendant alone through the nominal agency of the respective local or subsidiary [fol. 229] corporations, and that defendant is liable for and should be required to assess and pay the taxes involved.

The first question therefore is one of fact, which requires for its determination a return to the answers of defendant to the interrogatories propounded to it and to the written stipulation agreed to and filed by the parties. To undertake to insert herein defendant's answers to the interrogatories, and the parts of the stipulation containing the decisive facts, would be an unnecessary consumption of time and space, and we will content ourselves by giving the substance of what is shown by them as constituting the facts.

The defendant was incorporated in Virginia on February 20, 1894, and acquired and operated a railway system in Virginia, and other places, until now it owns and operates in its name, in states outside of Kentucky, railroad lines aggregating more than nine thousand miles. In 1868 the Legislature of this State incorporated

the "Louisville, Harrodsburg and Virginia Railroad Company," which constructed and operated a part of the one hundred and twenty seven miles of line now ostensibly owned and operated by the "Southern Railway Company in Kentucky."

[fol. 230] In 1884 the charter of the Louisville, Harrodsburg and Virginia Railroad Company was amended and the name of the company changed to "Louisville Southern Railroad Company," and it subsequently acquired some branch lines which had been constructed by other local railroad companies. In the meantime the Louisville Southern Railroad Company leased its line of railroad to other railroad companies and in July, 1893, it made default in the payment of interest on its bonded indebtedness, which resulted in a foreclosure proceeding in the Circuit Court of the United States for the District of Kentucky, in which there was a decree for the sale of its property, and at that sale a director of the defendant, Southern Railway Company, purchased the property which was paid for by the defendant and it, on August 17, 1894, caused the "Southern Railway Company in Kentucky" to be organized with defendant subscribing for all of the stock except a few shares held by its directors but only for the purpose of forming the corporation the stock being held by the individual stockholders in reality for the use and benefit of defendant, and the stock of the "Southern Railway Company in Kentucky" has continued to be held in the same manner since its organization.

[fol. 231] At the time of the decretal sale of the properties of the Louisville Southern Railway Company, and at the time of the organization of and the taking over of that property by the "Southern Railway Company in Kentucky," it acquired 769 cars of all kinds, and also 25 steam locomotives, which included its entire rolling stock; and since then whenever any such rolling stock became unfit for any cause it was supplied by the defendant, Southern Railway Company, at its own expense without any charge to the "Southern Railway Company in Kentucky." During all of the time the directors and officers of the two companies were the same individuals, but perhaps the "Southern Railway Company in Kentucky" did not have the number of directors that the defendant Southern Railway Company had, but the members of the directorate in the one company were also members or the directorate in the other. The receipts from the operation of the portion of the system operated in the name of the "Southern Railway Company in Kentucky" were and are sent directly to its treasurer in Washington, who is also the treasurer of the [fol. 232] defendant company, since, as we have seen, each company has the same officers. The "Southern Railway Company in Kentucky" in making its reports to the Interstate Commerce Commission stated each year that it was merged in the defendant Southern Railway Company, and the latter company made the same report and also stated in its annual reports to its stockholders covering the very years involved here that it owned the "Southern Railway Company in Kentucky." At all of the stations in Kentucky, along the lines of the latter company, are large signs or bulletin boards at its depots advertising the line as "The Southern Railway System" and in all

of the folders published and distributed by the defendant the trackage of the "Southern Railway Company in Kentucky" is shown to be a part of the Southern Railway System as much so as are any of the lines in Virginia or any other state in which it operates.

The same unifying facts are not shown with reference to the other three companies involved, viz: The Cumberland Railroad Company, the Cumberland Railway Company and the Mobile and Ohio Railroad Company. In the latter company the defendant is shown to own a majority of the stock, and in this way it, in a sense, controls that company at least in the election of its directors and officers, [fol. 233] many of whom are the same as those in the defendant company, but it is not shown that the earnings of that company are handled by the defendant to the extent and in the same manner as are those of the "Southern Railway Company in Kentucky" are handled; nor does it appear that the defendant furnishes to that company its depleted rolling stock either with or without charge to it. Many of the acts indicating complete ownership found to exist with reference to the "Southern Railway Company in Kentucky" are not shown with reference to the operation of the Mobile & Ohio lines. The Cumberland Railroad Company is a Tennessee corporation, and has a different set of officers from the defendant and while the latter may own a majority of its stock and control its policies, it is quite clear that there is not enough appearing in the record to destroy the separate identity of the two corporations, or to justify us in treating *than* as unified in the single operation. The same may be said with reference to the Cumberland Railway Company, which, however operates only 1.74 miles of tract all of which is in Bell County in this State.

We will therefore devote the remainder of this opinion to a determination of the question whether the line of railway which is [fol. 234] ostensibly operated by the "Southern Railway Company in Kentucky" is and has been actually and in legal contemplation owned and operated by the defendant, Southern Railway Company, so as to make it amenable to the payment of taxes in Kentucky on its intangible property in proportion that the length of that line bears to the length of the entire lines operated by it.

It is earnestly insisted by counsel for defendant that neither its ownership of a majority or even all of the stock in the "Southern Railway Company in Kentucky," nor the maintenance by it of an office in this State for the purpose of soliciting and routing freight and passengers to their destination, constitutes "doing business" in this State so as to render it liable for the taxes sought to be imposed, and in support of the stock ownership contention we are referred to the cases of *Commonwealth v. Muir*, 170 Ky., 435; *Calor Oil and Gas Co., v. Franzell*, 128 Ky., 715; *City of Louisville v. McAteer*, 26 Ky. L. R., 425; *Bell, Sheriff v. City of Louisville*, 106 S. W. (Ky.) 86; *Conley v. Matheison Arkali Works*, 190 U. S., 406, and *Interstate Commerce Commission v. Stickney*, 215 U. S., 98, and cases authorized [fol. 235] ties referred to therein; and in support of the latter contention with reference to the maintenance of the office for the solicitation of freight and passengers, the cases of *Green v. C. B. & Q.*

Ry. Co., 205 U. S. 530 and Philadelphia & Reading Railroad Co. v. McKibben 243 U. S., 264, are cited. Both propositions are sound in the abstract as the cases cited fully demonstrate, and as is also shown in the text of Fletcher's Cyclopaedia of Corporations, Vol. 9, pages 9985 and 10024 with numerous cases cited in the notes. Indeed, neither of the propositions are disputed by counsel for the Commonwealth, but the question involved here is not what constitutes "doing business," but rather who is it that is doing the business which is done by the "Southern Railway Company in Kentucky." If there were nothing else appearing in this case except what is contained in the two contentions just mentioned, there would be no difficulties in the way of affirming the judgments appealed from; but the problem before us is whether the facts as hereinbefore recited are sufficient, taken in connection with the ownership of the entire stock, to show that defendant is the real owner and operator [fol. 236] for and of course the controller, of the railroad lines in Kentucky, which purport to be owned, operated and controlled by the "Southern Railway Company in Kentucky."

Statutes enacted pursuant to the authority conferred by the Constitution for the purpose of imposing a general ad valorem tax will be construed according to the rules for interpreting other Statutes, i. e., so as to carry out the intention of the Legislature as gathered from the terms of the statute itself; and while a special tax Statute will not be construed so as to include property not intended by the Legislature, as was held in the case of City of Maysville v. Maysville Street Railway Co., 128 Ky., 682; nor will a statute imposing a corporation organization tax be given a retroactive effect, without authority in the Statute to do so, so as to include corporations previously organized, as was held in the case of Creelius v. Carrollton Savings and Loan Association, 167, Ky., 813; yet, "A statute imposing a tax upon a corporation will not be construed literally, it is susceptible of any other reasonable construction, where a literal construction would enable the corporation to evade taxation, for [fol. 237] statutes are always to be construed in accordance with the intention of the legislature, and it is not to be supposed that the Legislature intends that taxation shall be evaded." Fletcher's Cyclopaedia of Corporations, page 7929.

It is insisted that the tax sought to be collected can only be imposed upon corporations, companies or associations "exercising any special or exclusive privilege or franchise not allowed by law to natural persons," and that the defendant, as owner of the stock of the "Southern Railway Company in Kentucky," is exercising only the same privilege that a natural person may exercise. If, however, the facts are that in addition to the ownership of such stock the defendant is in reality performing a public service in Kentucky by exercising the franchises and privileges of a common carrier in the name of another as agent only and to whom the Commonwealth has granted such franchises and privileges, it would be doing something more than a natural person would be authorized to do, and the question again recurs whether the defendant is in reality operating the line of the "Southern Railway Company in Kentucky" in the manner in-

dicated. It has been a guiding rule of courts from time immemorial to regard the substance rather than the shadow, and to determine questions according to appearances.

[fol. 238] In the case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission, et al.*, 219 U. S., 498, the question was presented to the Supreme Court of the United States as to the identity of the Southern Pacific Railway Company with the appellant company, which was a local one operating in the city of Galveston, Texas. The facts are stated in the opinion and which we will consume neither the time nor the space to restate in this opinion, except to say that among the facts appearing was that of stock ownership in the local company by the Southern Pacific Company. The Supreme Court, in holding the facts sufficient to show a complete identification of the companies, said: "In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate [fol. 239] operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single."

A similar question was before the same court in the case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic and Commerce Association*, 247 U. S., 490. In that case two trunk line railway companies, one of them designated in the opinion as the "Milwaukee Company" and the other one as the "Omaha Company," owned and operated lines of railroads running into the cities of Minneapolis and St. Paul, Minnesota. They organized a local company known as the Minneapolis Eastern Railway Company, which connected the termini of the two trunk lines in Minneapolis with the city of St. Paul and with certain milling interests therein. Under a contract with the three companies only three hundred (300) shares of the unauthorized capital stock of the local company were issued, and each of the trunk lines took seventy-five (75) shares, and five (5) were issued to qualifying directors of the local company, and one hundred and forty-five (145) were issued to a trustee for the "Eastern" or local company; but the superintendent, having charge of the operation of the local company could not be appointed without the consent of the two trunk lines. There were other facts showing the completeness of the control of the local company by the two [fol. 240] owners of the trunk lines. In this suit it was charged that the local company was in reality owned by the two trunk line owners and it was sought to control switching charges made by the local company for freight hauled from one city to the other and to

their designation on the lines of the local company. After enumerating the facts, some of which we have not stated, the court said: "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public."

Other illustrative cases are *Colonial Trust Co. v. Montello Brick Works*, 172 Fed., 310, and *Cutler v. Cutler-Hammer Manufacturing Co.*, 266 Fed., 388. In those cases, as well as in 26 R. C. L., 164, the rule is announced that whether a corporation is "doing business", so as to render it amenable to the local law, is a question "which depends upon the facts of each particular case", and is necessarily not concluded by the mere fact of adopting a different name in which the particular business is transacted. The case of *Peterson v. Chicago, Rock Island & Pacific Railway Co.*, 205 U. S., 364, strongly relied on, does not militate against that rule, since under the facts of that case it was determined that the companies involved were not identical or unified, but continued to maintain their separate existence and also the independent operation of their respective properties.

In the case of *Southern Railway Company in Kentucky v. [fol. 241] Thomas*, 28 Ky. L. R., 951, the question of the identity of the same two companies here involved was before this court and many of the facts appearing in this case appeared also in that one, and the court said: "Taking all the proof together, there was sufficient proof to warrant the jury in concluding that the Southern Ry. in Kentucky is simply one of the divisions of the Southern Ry. Co., and that although a different corporate name is used, it is the same thing as the Southern Ry. Co., the name only being changed by by adding the words 'in Kentucky.' In determining the liability of the corporation, the court will look at the substance, and not the mere form. (*Davis Adm'r. v. C. & O. R. R. Co.*, 25 Ky. Law Rep., 342.)"

In addition to the foregoing authorities, our attention has been called to the two English cases of *Apthorpe v. Peter Schoenhofen Co.*, 79 Law Times Rep., (N. S.) 98, and *St. Louis Breweries v. Apthorpe*, 79 Law Times Rep., (N. S.) 551. In those two cases an imposed income tax was sought to be collected from an English corporation which transacted none of the business in its name from which the company derived the income sought to be taxed, but the business was conducted in America, in the one case by an American corporation located in Chicago, Illinois, and in the other case by a similar corporation located and operated in the city of St. Louis, Missouri; but the English corporation owned the stock of the two American companies, elected their directors and otherwise controlled their active management, and to all intents and purposes the English

company was actually engaged in business in America, but in the name of the two American companies; and the courts held that the income was produced by business transacted by the English companies and sustained the tax. In the *St. Louis Breweries* case the court said: "What one looks at is not the words, but the substance. Now, there being to my mind this perfectly satisfactory ground on which to base the decision in this case, I do not propose to discuss the question whether the English company can be said to be carrying on the business of the American Company. All I would wish to observe is that in matters of this kind, especially in revenue matters, it seems to me that one ought to look at the substance, and not merely at matters of machinery and form; and there is a great deal to be said, I think, in favor of the larger view taken by the attorney general that, in effect and substantially, this English company is, through the American company, doing the business they do."

Another important fact that should not be overlooked is, that all of the cases in which the question was presented, including those relied on by defendant, the strongest of which perhaps is the *Peterson* case, *supra*, the court enters into a labored discussion and a detailed analysis of the facts in an effort to determine whether the different corporations involved were identical, or were in fact merges into one, when such discussion would be profitless and wholly unnecessary, if the mere fact of operating under a different name was determinative of the question. If separate nominal operation was alone decisive and labored discussion of the facts by the court in the respective cases was superfluous and a mere idle indulgence. We can not believe that such discussions were perfunctory only, but rather are we convinced that the court in each case was endeavoring to [fol. 243] find the actual facts and to determine the question from them, and that the effort to ascertain the decisive facts was a determination by implication that they, when found, should prevail and govern the ultimate decision of the question, regardless of the nominal operation.

In the light of the foregoing authorities, and many others which could be cited, and looking at the proposition from a logical and common sense standpoint, we can not escape the conclusion that in each of the years involved defendant, Southern Railway Company, was the owner of and actually operated the lines of the "Southern Railway Company in Kentucky," not in its name but in that of the latter company, which latter fact was the shadow, but the actual operation was the substance. Defendant could not have more effectually operated these lines if it had done so in its own name. Every act looking to the control and management of them during the times mentioned was set in motion and actually executed by the same brains which conducted the operation of its admittedly owned lines, and the income from the Kentucky operation was sent to and presumably disbursed by the same officer who received and disbursed the income from the Southern Railway System proper. The defendant gave out to its stockholders and announced to the

travelling public that it owned the lines of the "Southern Railway Company in Kentucky," and to allow it to escape taxation on its just proportion of its intangible property subject to taxation in Kentucky, because of the mere shell or hull in whose name it was operating its Kentucky division, would not only be surrendering the substance to the shadow, but would demand of us that we shut our eyes to the [fol. 244] facts, and to thus permit one, whom the statute was intended to reach, to escape taxation through the disguise produced by the figment of the Kentucky corporation, and to thereby enjoy in this Commonwealth special privileges not allowed to individuals without contributing its just proportion to the burdens of government. This is a practical age in which we live and facts are regarded more than fiction, and courts recognize things as they are and not as they appear when clothed in a disguised garb. It is our conclusion, therefore, that the court should have assessed against defendant Kentucky's portion of its intangible property assessed by the proportion of the mileage that the lines nominally operated by the "Southern Railway Company in Kentucky" bear to the entire mileage of defendant's system estimated according to the method provided by the statute.

But, it is insisted that this would result in taxing in Kentucky property having no situs here. A sufficient answer to this is that under the conclusions we have reached the result is the same as if the Kentucky division had been actually operated in the name of the defendant, the same as is the operation of the Illinois Central Railroad Company and other foreign common carriers who pay a similar tax under the same statute. The authorities are unanimous in holding that the intangible property subject to local taxation is not to be estimated alone according to the business done on that division of the railway system located within the taxing authority, but it is to be proportioned according to the business done over the entire system of which the local line or division is a part. Thus, in the case of *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S., 439, it is said: The true [fol. 245] value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed." See also *Fletcher's Cyclopaedia of Corporations*, Vol. 7, pages 8067-8078, both inclusive, and the following cases from this court: *Baltimore & Ohio Southwestern R. R. Co. v. Commonwealth*, 177 Ky., 566; *Bosworth, Auditor v. Evansville & Bowling Green Packing Co.*, 178 Ky., 716; *L. & N. R. R. Co. v. Commonwealth*, 181 Ky., 193, and *Bosworth v. Kentucky Highlands R. R. Co.*, 183 Ky., 749.

The Commonwealth in these cases recognizes the right of the de-

defendant to credit the amount of taxes which may be assessed herein by the amount of the taxes paid for the respective years on intangible property assessed by the "Southern Railway Company in Kentucky" which, according to our opinion, is all the relief growing out of that fact to which the defendant is entitled. And, of course, if Kentucky's proportion of the estimated intangible property of the defendant is not equal to or greater than the amount of intangible [fol. 246] property assessed and tax paid by the Kentucky company, no judgment can be rendered against the defendant in either of the cases; otherwise the Commonwealth is entitled to have assessed the excess of the intangible property if any.

The proceedings are in the nature of a common law action but to be tried by the court without the intervention of a jury. The lower court did not reach the point of making an estimation of the intangible property to be taxed in Kentucky, since, as we have seen, the statements were dismissed upon the ground that the defendant was not liable in any event. We therefore have a case in which there is no adjudication upon the amount of property to be assessed by the court having original jurisdiction of the subject matter. The litigants have but lightly discussed the question as to the amount of the estimation to be made, nor are we fully aware that the case when submitted was prepared with that point in view. We have, therefore, concluded to remand the case to the Circuit Court with directions that it proceed to ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky, according to the prevailing rule of law upon the subject.

Wherefore the judgment in each of the cases is reversed and remanded for proceedings not inconsistent with this opinion.

L. W. Morris, Frankfort, Ky.; Hazelrigg & Hazelrigg Frankfort, Ky.; Hobson & Hobson, Frankfort, Ky.; for appellant.

Humphrey, Crawford & Middleton, Louisville, Ky.; Wallace & Harris, Versailles, Ky.; for appellee.

[fols. 247 & 248] IN COURT OF APPEALS OF KENTUCKY

MOTION AND ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—Nov. 29, 1921

Came the appellee by counsel and filed notice of intention to file a petition for rehearing.

And afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid, on the 13th day of December 1921, the following order was entered, to-wit:

COMMONWEALTH
v.
SOUTHERN RAILWAY COMPANY
Woodford
COMMONWEALTH
v.
SOUTHERN RAILWAY COMPANY
Woodford

Came parties by Counsel and filed joint motion for 30 days time from December 16th, 1921, in which appellee may file petition for rehearing. Which motion is submitted.

The Court being sufficiently advised, it is considered that appellee's motion for 30 days from Dec. 16, 1921, to file petition for rehearing be and the same is hereby sustained.

[fol. 249] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

MANDATE—Filed in Circuit Court Feb. 16. 1922

The Court being sufficiently advised, it seems to them the judgment in each of the above cases is erroneous.

It is therefore considered that the judgment in each case be reversed and cause remanded for proceedings not inconsistent with the opinion herein.

Which is ordered to be certified to said Court.

A Copy.

Attest:

Roy B. Speck, C. C. A., by Jeff Wood, D. C.

Issued February 9, 1922.

[fol. 250]

[File endorsement omitted]

IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, Defendant,

and

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, &c., Defendants.

SERVICE OF MANDATE—Filed Feb. 16, 1922

Notice is accepted that the plaintiff has filed the Mandate of the Court of Appeals in the above two causes in the Clerk's Office of the Woodford Circuit Court. February 9, 1922.

Humphrey, Crawford & Middleton, Wallace & Harris, Attorneys for Defendants.

[File endorsement omitted]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

[fol. 251]

ORDER FILING MANDATE—Feb. 27, 1922

On motion of the plaintiff in each of the two foregoing causes it is ordered that the Mandate from the Court of Appeals and the Notice filed in the above styled causes during vacation and on the 16th day of February, 1922, be and they are each and all hereby noted of record.

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED ANSWER OF SOUTHERN RY. CO.—Filed May 20, 1922

The defendant, the Southern Railway Company, reiterates and reaffirms each and every allegation contained in its original answer hereto filed, and for amendment says:

That for the years referred to in the petition, that is, for each of the years ending June 30, 1914, June 30, 1915 and June 30, 1916,

it owned and operated a line of railroad extending from Washington, D. C., south into the States of Virginia, North Carolina, South [fol. 252] Carolina, Tennessee, Georgia, Florida, Alabama and Mississippi; that it also owned and operated a line of road extending from New Albany, Indiana, to East St. Louis, Illinois, a distance of 264.99 miles; that the western terminus of the lines of the Southern Railway Company in Kentucky was for each of said years at Louisville, Kentucky; that the only connection between the western terminus of the Southern Railway Company in Kentucky and the line of this defendant extending from New Albany, Indiana to East St. Louis, Illinois, was over the tracks and bridge of the Kentucky & Illinois Terminal Railroad Company; that this defendant did not own, operate, lease or control the said Kentucky & Indiana Terminal Railroad Company, but only owned one-third of its capital stock.

That the main line of the Southern Railway Company in Kentucky was from Louisville to Danville, with branch lines extending from Harrodsburg to Burgin, from Lawrenceburg to Lexington, and from Versailles to Georgetown, all in the State of Kentucky, and that the total mileage of the said lines in Kentucky was 164.41 miles; that at each of said eastern terminals, to-wit at Georgetown, Lexington, Burgin and Danville, Kentucky, the lines of the Southern Railway Company in Kentucky connected only with the main line of the Cincinnati, New Orleans & Texas Pacific Railway Company extending from Cincinnati, Ohio to Chattanooga, Tennessee; that this defendant did not for any of said years own, operate, lease or control any line of railroad which ran into either Georgetown, Lexington, Burgin or Danville, Kentucky; that the nearest point to any of said places where this defendant did own, operate, lease or control a line of railway was Harriman Junction, Tennessee, on the line of the C. N. O. & T. P. Ry., and that said Harriman Junction was a distance of 141.8 miles south from Danville, Kentucky; that the only other point on the C. N. O. & T. P. Ry. Co. [fol. 253] lines where this defendant owned, operated, leased or controlled any line of railroad was at Chattanooga, Tennessee, which place was 221.5 miles south from Danville, Kentucky.

This defendant did not for any of said years, either directly or indirectly, own, operate, lease or control the said Cincinnati, New Orleans & Texas Pacific Railway Company, but that said Company for each of said years was operated by its own management and entirely in its own interests; that the only arrangement for the years ending June 30, 1914, June 30, 1915, and June 30, 1916, under which the said C. N. O. & T. P. Ry. handled traffic between this defendant and the Southern Railway Company in Kentucky was the same arrangement as existed between any independent connecting carriers, that is, that the traffic was handled by the C. N. O. & T. P. Ry. on an established basis of division rates and fares as a connecting carrier and that such basis of division was negotiated by the traffic officers of the said C. N. O. & T. P. Ry. Co. with the traffic officers of this defendant; that for each of said years the said C. N. O. & T. P. Ry. Co. maintained an independent traffic organiza-

tion, both freight and passenger; that this independent traffic organization of the said C. N. O. & T. P. had complete control and charge of its rates, fares, divisions, routing and interchange with connections and shaped and controlled its policies solely in the interests of the said C. N. O. & T. P. Ry. Co.; that the traffic affairs of the said C. N. O. & T. P. Ry. Co. were as separate and distinct from those of this defendant or the Southern Railway in Kentucky and [fol. 254] administered as independently thereof as are those of the Illinois Central, the Louisville & Nashville, or any other line; that the traffic department of the said C. N. O. & T. P. Ry. Co. published during each of said years its separate independent tariffs and maintained its separate independent soliciting organization; that its interchange policy was conducted with all of its connections in the manner that is customary between connecting and independent lines generally, its policy being determined by what was to the best interests of the said C. N. O. & T. P. Ry. Co. and without any reference to this defendant or the Southern Railway Company in Kentucky.

Defendant says that the Mobile & Ohio Railroad Company had a line of road extending from St. Louis, Missouri to Mobile, Alabama; that the said Mobile & Ohio Railroad Company was operated under its own management as an entirely independent line; that the said Mobile & Ohio Railroad Company maintained an independent freight and passenger traffic organization, and that this independent traffic organization of the said Mobile & Ohio Railroad Company during each of said years had complete charge and control of its rates, fares, divisions, routing and interchange with connections and shaped and controlled its traffic policies solely in the interests of the Mobile & Ohio and entirely independent of this defendant; that the traffic officers of the said Mobile & Ohio were as separate and distinct from those of this defendant and administered as independently thereof as were those of the Louisville & Nashville, the Illinois Central, or any other entirely independent railroad; that the traffic department of the Mobile & Ohio Railroad Company published its separate independent tariffs and maintained its [fol. 255] own separate independent soliciting organization; that its interchange policy was entirely independent of any influence by the Southern Railway Company, and that for each of said years it conducted its interchange relations with its connections in the manner that is customary between connecting and independent lines generally, its policy being determined by what was to the best interests of the Mobile & Ohio and without reference to any relation of stock ownership or otherwise of this defendant.

Defendant says that its lines from New Albany, Indiana to East St. Louis, Illinois, together with the lines in Kentucky of the Southern Railway Company in Kentucky were not a part of the general system of this defendant, and that the said lines were entirely disconnected from, distinct from, and removed from any other lines of this defendant.

Defendant says that the net railway operating income for the year ending June 30, 1914 of its line from East St. Louis, Illinois

to New Albany, Indiana and the railway operating income of the Southern Railway Company in Kentucky were \$596,940.69; that the hire of equipment and joint facility rents for both of said lines for said period was \$300,022.34; that the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.41 for said period, and that the mileage of this defendant in Indiana including trackage rights was 239.50 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89 for said period:

[fol. 256] That the railway operating income for said lines for the year ending June 30, 1915 was \$444,672.64; that the hire of equipment and joint facility rents for both of said lines for said period was \$318,718.93; and that for said period the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.41, and that the mileage of this defendant in Indiana including trackage rights was 239.50 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89 for said period:

That the railway operating income for said lines for the year ending June 30, 1916 was \$990,405.26; that the hire of equipment and joint facility rents for both of said lines for said period was \$305,123.42, and that for said period the mileage of the Southern Railway Company in Kentucky including trackage rights was 164.64, and that the mileage of this defendant in Indiana including trackage rights was 239.19 for said period, and that the mileage of this defendant in Illinois including trackage rights was 162.89:

That the proportion of the mileage in Kentucky to the mileage in Illinois and Indiana for the year 1914 was 29.%; that the proportion for the year ending 1915 was 29.%; and that the proportion for the year ending June 30, 1915 was 29.05%.

Defendant says that on account of the facts pleaded herein and facts pleaded in its original answer it would be a violation of the constitution of the State of Kentucky, and of the constitution of the United States, particularly the Fourteenth Amendment thereof, to assess against this defendant any franchise tax for any of the years stated in the petition, and that the effort made herein is simply for [fol. 257] the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation property not in Kentucky and values appertaining to property not in Kentucky and earnings derived from property not in Kentucky, and to do so would be a violation of the constitution of the State of Kentucky, and the constitution of the United States, particularly the Fourteenth Amendment thereof.

Wherefore, defendants pray as in its original answer.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

REPLY TO AMENDED ANSWER—Filed May 20, 1922

Comes the plaintiff, Commonwealth of Kentucky, by &c. and for reply to the amended answer of defendant says that the Kentucky & Indiana Terminal Railroad Company is a mere city belt line consisting of a bridge over the Ohio River at Louisville, Kentucky with approaches thereto and certain switch lines in and around said Louisville, Kentucky. All traffic of defendant, which said defendant so [fol. 258] desired, was moved by defendant over the tracks of said K. & I. under a contract for the payment of money by defendant to said K. & I. for the use of said trackage, and was so moved by defendant using defendant's own engines, and cars and on defendant's own schedules. Other railroads used said K. & I. tracks on like terms. Said K. & I. owned no rolling stock, except certain switch engines, and operated no trains; and said bridge, approaches and switch lines were used only as above stated.

Plaintiff says that defendant thus operated a continuous line of railway from Kentucky to East St. Louis, Missouri, and at said East St. Louis, defendant connected physically through a like city terminal belt line with the Mobile & Ohio Railroad Company, which said M. & O. connected physically with defendant's line at several points in Alabama and Mississippi. All traffic to and from said defendant's line in Kentucky, Indiana and Illinois was routed by defendant by way of said M. & O. or by way of said C. N. O. & T. P. as defendant found more expedient or more profitable to it.

All connecting carriers are required by law to interchange traffic and to carry traffic delivered to them by another connecting line. Defendant routed all of its said traffic over said M. & O. or C. N. O. & T. P. as might be to its own advantage in so doing, and had power to and did direct said traffic.

Plaintiff says that defendant's lines from New Albany, Indiana, to East St. Louis, Missouri, together with the lines in Kentucky of the Southern Railway in Kentucky were a part of the general system of the defendant. It denies that said lines or either of them were disconnected from, or distinct from, or removed from any other lines of defendant.

[fol. 259] Plaintiff denies that at any time named in the statement the traffic affairs of the C. N. O. & T. P. R. Co., or the Mobile & Ohio R. Co., were as separate and distinct from those of the defendant or administered as independently thereof as are those of the Illinois Central or the Louisville and Nashville or any other line, or that the policy was determined alone by what was to the best interests of said C. N. O. & T. P. R. Co., or Mobile & Ohio R. Co., or without any reference to the defendant or the Southern Railway Company in Kentucky.

Plaintiff says that at all times mentioned in said statement, the defendant owned and controlled the majority of the capital stock of

the Mobile & Ohio Railroad Company and by virtue of such stock ownership controlled and operated said line by agents and servants so selected and controlled by them.

Wherefore, plaintiff prays as in its original statement.

W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 260] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ADDITIONAL STIPULATIONS OF FACTS—Filed May 20, 1922

In view of the defendant's Amended answer, the parties hereto by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court, in addition to the stipulations filed heretofore.

1. The Kentucky & Indiana Terminal Railroad Company is a line owning and operating over eight miles of double main track, or sixteen miles of main track, and in addition has twelve miles of industrial track and thirty-six miles of track in its yards. It has extensive shops in Louisville, Kentucky, valued at over \$700,000.00 and at which it employs three hundred and sixty-six men. It has 19 engines and there are more than 200 manufacturing or industrial concerns located entirely on its tracks. It serves these industrials by carrying cars to and from them regardless of the point of origin or the point of destination of such cars. The main track of the Kentucky & Indiana Terminal Railroad Company is used by the Southern Railway Company in Kentucky in the operation of its freight and passenger trains to and from Louisville; such trains being operated by the engines of the Southern Railway Company in [fol. 261] Kentucky and by that Company's train chess, but subject to the orders of the dispatchers of the Kentucky & Indiana Terminal Railroad Company. The Kentucky & Indiana Terminal Railroad Company also owns and maintains a bridge across the Ohio River, which bridge is also used by the Southern Railway Company in the manner heretofore detailed with regard to the Southern Railway Company in Kentucky. The main line of the Kentucky & Indiana Terminal Railroad Company is used by other railroads in the same way that it is used by the defendant, or by the Southern Railway Company in Kentucky. This use by the Kentucky & Indiana Terminal Railroad Company and by the defendant, the Southern Railway Company in Kentucky, is under a contract between the two companies which contract is similar to the contract which the Kentucky & Indiana Terminal Railroad Company has with various other roads.

The Kentucky & Indiana Terminal Railroad Company owns no cars or rolling stock except engines. It is a terminal company that is used by a number of railroads doing business in Louisville. The capital stock of the said Kentucky & Indiana Terminal Railroad Company is owned equally by the defendant and the Baltimore & Ohio Southwestern Railroad Company and the Chicago, Indianapolis & Louisville Railway Company. All thereof said equally owning companies use the tracks of the Terminal Company.

a. At East St. Louis, Missouri, there is a terminal railroad company which connects with all of the railroads entering East St. Louis. There is no other connection between the lines of the Southern Railway Company at East St. Louis and the lines of the Mobile & Ohio at East St. Louis. The operation of the Terminal Company at [fol. 262] East St. Louis is practically the same as the operation of the Kentucky & Indiana Terminal Company except that the engines of the Terminal Company are used in carrying the trains over the Terminal Company's tracks.

3. The lines of the Mobile & Ohio Railroad Company and of the Southern Railway Company connect at Corinth, Mississippi, and at Mobile, Blocton, Mapleville and Birmingham, Alabama.

4. The Mobile & Ohio Railroad Company and the Southern Railway Company are competitors for the business from St. Louis and the west, south, in that each of said roads keep independent traffic and soliciting offices each of which solicits for its own road, and independent of each other, business going south. The Mobile & Ohio gives to the competitors of the Southern Railway Company more business than it gives to the Southern Railway Company. The Southern Railway Company on business from the St. Louis and Louisville lines transports the said business the longest possible distance over its said lines and wherever possible, carries the same to Danville, Kentucky, and delivers it to the Cincinnati, New Orleans and Texas Pacific Railway Company.

All railroads haul traffic delivered to them the longest possible distance over their own lines.

5. Former Stipulation No. 21 is erroneous to the extent that it states that on the stations and bulletin boards of the Southern Railway Company of Kentucky and on its office buildings there were the signs "Southern Railway System."

[fol. 263] The words "Southern Railway System" were not used prior to February, 1917. At the stations and on the tickets of the Southern Railway Company in Kentucky, there was a capital S and R with an arrow through them. These same letters and signs appeared on the tickets and stations of the Southern Railway Company.

6. Freight and passengers going north from points south on the Southern Railway to Louisville or other Kentucky points, which were routed over the C. N. O. & T. P. railroad were carried on the

Southern to the junction with the C. N. O. & T. P., then by the C. N. O. & T. P. to Danville, and then by the Southern Railway Company in Kentucky to the destination; and in the same way, freight and passengers going south from Louisville and the Kentucky points, which were routed over the C. N. O. & T. P. were carried to points on the Southern in the South. Through freight bills of lading and through passenger tickets were issued and the proceeds were divided according to mileage.

In the same way like business between Louisville and St. Louis, going south from St. Louis which was routed over the M. & O. was carried by the M. & O. to some junction of the M. & O. with the Southern, and business going north from the Southern to these points which was routed over the M. & O. was done in the same way.

Through bills of lading and through passenger tickets may be bought on all connecting railroads and the proceeds are divided according to mileage.

7. Through passenger trains were run from St. Louis, Missouri to Danville, Kentucky, but no further. Pullman sleeping cars from [fol. 264] St. Louis or Louisville to points south were hauled from Danville, south on the trains of the C. N. O. & T. P. Railway Company. Practically all railroads operated sleeping cars from points on their lines to points of entirely independent Connecting railroads.

8. The defendant for each of the years involved owned the majority of the capital stock of the Mobile & Ohio Railroad Company and elected its Board of Directors. All of the officers of the said Mobile & Ohio Railroad were elected by the said Board of Directors.

9. It is further stipulated that plaintiff read on the trial the printed maps contained in the various stockholders' reports filed.

10. Former stipulations No. 12 and 13 are erroneous. But, it is true that the Southern Railway Company of Virginia owned terminals, shops, double tracks outside the State of Kentucky which constituted an excess valuation, for 1914, \$43,699,232.53; for 1915, \$49,639,400.79; for 1916, \$55,260,111.19.

These figures include \$5,982,972, the outside excess value of the Mobile & Ohio Railroad Company for each of the years.

Humphrey, Crawford & Middleton, Wallace & Harriss, for Defendants. Jesse & Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Plaintiffs.

It is agreed that the traffic manager of the C. N. O. & T. P. R. Co. [fol. 265] and the Mobile & Ohio R. Co. will state that the traffic affairs of said C. N. O. & T. P. R. Co. and Mobile & Ohio R. Company were as separate and distinct from those of this defendant and administered as independently thereof as those of the I. C. R. Co. or the L. & N. R. R. Co. or any other line and its policy was de-

terminated alone by what was to the best interest of the C. N. O. & T. P. R. Co. or Mobile & Ohio R. Co.

Hazelrigg & Hazelrigg, Hobson & Hobson, W. D. Jesse, L. W. Morris, for Plaintiff. Humphrey, Crawford & Middleton, Wallace and Harris, for defendants.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

[fol. 266] STIPULATION THAT CASES BE HEARD TOGETHER—Filed
May 20, 1922

The parties hereto by counsel, stipulate that the above cases may be heard together before Judge Charles C. Marshall of the Shelby Circuit Court at Shelbyville, Kentucky, on June 28, 1922.

Humphrey, Crawford & Middleton, Wallace & Harris, Attorneys for Defendant. W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 267] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

AMENDED ANSWER OF SOUTHERN RY. CO. & JAMES C. DAVIS—Filed
May 20, 1922

The defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, acting as Agent under Section 206 of the Transportation Act of 1920, reiterate and reaffirm each and every allegation contained in their original answer, and for amendment say:

That in January, 1917, the defendant, Southern Railway Company controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January, 1917, the defendant Southern Railway Company and the Alabama Great Southern Railroad Company acquired a majority of the capital stock so that the defendant Southern Railway Company could and did control through stock ownership the Cincinnati, New Orleans and Texas Pacific Railway Company from January, 1917, to the present time.

Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that for the year ending June 30, 1917, the railway operating income of this defendant and the lines owned, operated, leased and controlled by the defendant and by the C. N. O. & T. P. Ry. Co. was \$36,776-[fol. 268] 734.50; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition herein and including the mileage in Kentucky of the C. N. O. & T. P. Ry. Co. to the total mileage of the lines owned, operated, leased and controlled by the defendants including the mileage of the C. N. O. & T. P. Ry. Co. was 4.209 per cent; that for the said period the defendant Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of \$67,832,331.71; that none of the lines in Kentucky of any of the roads referred to in plaintiff's complaint had any such double tracks, shops, or terminals. The Cincinnati, New Orleans & Texas Pacific Railway Company had outside of Kentucky double tracks, shops and terminals of the excess value of \$1,019,582.15 over and above any double tracks, shops or terminals which it had inside of the State of Kentucky. Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that for the year ending June 30, 1917 the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company or the Officers of the Director General of Railroads, filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of said lines of road as required by statute and each company or the officers of the Director General of Railroads paid the [fol. 269] full tax assessed on its tangible and intangible property; that for said period the C. N. O. & T. P. Ry. Co. paid to the State of Kentucky a franchise tax on a franchise valuation of \$9,181,368.00, and that the other railroads in Kentucky mentioned in the petition paid taxes on a franchise valuation of \$3,500,053.00.

Defendants, Southern Railway Company and James C. Davis, Director General of Railroads, and each of them say that for the year ending Dec. 31, 1918, the railway operating income of this defendant and of the C. N. O. & T. P. Ry. Co. was \$36,017,327.13; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition herein and including the mileage in Kentucky of the C. N. O. & T. P. Ry. Co. to the total mileage of the lines owned, operated, leased and controlled by the defendants including the mileage of the C. N. O. & T. P. Ry. Co. was 4.273 per cent; that for the said period the defendant, Southern Railway Company had on its lines outside of Kentucky double tracks, shops, terminals, etc., of the value of \$8,160,065.06; that none of the roads mentioned in the plaintiff's petition in Kentucky had any such double tracks, shops, terminals etc. The Cincinnati, New Orleans & Texas Pacific

Railway Company had outside of Kentucky double tracks, shops, Terminals, etc. of the excess value of \$2,046,735.53 over and above the value of any double tracks, shops or terminals inside of the State of Kentucky.

Defendants, Southern Railway Company, and James C. Davis, [fol. 270] Director General of Railroads, and each of them, say that for the year ending December 31, 1918, the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company or the officers of the Director General of Railroads, filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all the operations of each of said lines of road as required by statute and each company or the officers of the Director General of Railroads paid the full tax assessed on its tangible and intangible property; that for said period the said C. N. O. & T. P. Ry. Co. paid to the State of Kentucky a franchise tax on a franchise valuation of \$9,173,208.00, and that the other roads in Kentucky mentioned in the petition paid taxes on a franchise valuation of \$3,500,512.00.

Defendants, Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, say that on account of the facts pleaded herein and the facts pleaded in their original answer it would be a violation of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment thereof, to assess against this defendant any franchise tax for any of the years stated in the petition, and that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation property not in Kentucky and values appertaining to property not in Kentucky and earnings derived from property not in [fol. 271] Kentucky and that to do so would be a violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the Fourteenth Amendment thereof.

Wherefore, defendants Southern Railway Company, and James C. Davis, Director General of Railroads, and each of them, pray as in their original answer.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendants.

[File endorsement omitted.]

IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

REPLY TO AMENDED ANSWER—Filed May 20, 1922

Comes the plaintiff, Commonwealth of Kentucky, By &c. and for amendment to its original reply says that the said State Tax Com-

mission made all railroad assessments for the year 1918 on the re-[fol. 272] ports filed as of June 30, 1917, and for said year 1918 said commission equalized all assessments, including all railroad assessments at 75%. Said State Tax Commission made all railroad assessments for the year 1919 on the reports filed as of December 31, 1918; and for said year 1919, said commission equalized all assessments, including railroad assessments, at 85%. Plaintiff denies that any assessment was equalized at 70% for either of two years named in its statement.

For reply to defendant's amended answer, plaintiff admits that said C. N. O. & T. P. Ry. Co. was a part of the general system of defendant for said two years and was operated as alleged. Admits that the Southern Railway in Kentucky, and other railroads in Kentucky mentioned in the petition, including the Cincinnati, New Orleans & Texas Pacific Railway Company, or the officers of the Director General of Railroads filed with Kentucky State Railroad Commission, the State Board of Valuation & Assessment, and the State Tax Commission of Kentucky reports for the year ending June 30, 1917, denies that said reports or any of them, were full reports, or showed the result of any or all operations or operations of each or any or all of said lines as required by statute. Admits that the Southern Railway in Kentucky, and other railroads in Kentucky mentioned in the petition, including the said C. N. O. & T. P. or the officers of the Director General of Railroads filed with the Kentucky State Railroad Commission, the State Board of Valuation & Assessment, and the State Tax Commission of Kentucky reports for the year ending December 31, 1918; denies that said reports or any of them, were full reports, or showed the result of any or all operations or operation of each or any or all of said lines as required by statute.

Plaintiff denies that on account of the facts or fact pleaded by defendants in their original answer, or for other reason, it would be a violation of the Constitution of Kentucky, or of the Constitution of the United States, or of any amendment thereof to assess against this defendant a franchise tax for either or any of the years stated. Plaintiff denies that the effort made herein is simply, or at all, for the purpose of endeavoring to bring into the State of Kentucky for the purpose of taxation, property not in the State of Kentucky or value or values appertaining to property not in Kentucky, or earning or earnings derived from property not in Kentucky. Denies that to do so would be a violation of the Constitution of the State of Kentucky, or the Constitution of the United States, or of any amendment thereof.

Wherefore, plaintiff pleads as in its original statement.

W. D. Jesse, L. W. Morris, Hazelrigg & Hazelrigg, Hobson
& Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 274] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

ADDITIONAL STIPULATION OF FACTS—Filed May 20, 1922

In view of the defendant's amended answer, the parties hereto, by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the Circuit Court, in addition to the Stipulations filed heretofore.

1. Effective January, 1917, the executive and other officers of the defendant, Southern Railway Company, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January, 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway System. Since January, 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked "Southern," and at all of the stations of the Cincinnati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them "Southern Railway System," and on the caps and [fol. 275] uniforms of the conductors there was the word "Southern."

2. The Cincinnati, New Orleans & Texas Pacific Railway Company owns and operates a line of railroad in the State of Kentucky 197.50 miles long. It passes through the following counties and has the following mileage in each:

Kenton County.....	14.37 miles
Boone County.....	9.13 "
Grant County.....	22.45 "
Harrison County.....	2.43 "
Scott County.....	22.21 "
Fayette County.....	13.88 "
Jessamine County.....	15.94 "
Mercer County.....	8.14 "
Boyle County.....	10.42 "
Lincoln County.....	23.83 "
Pulaski County.....	30.99 "
McCreary County.....	23.71 "

 197.50 miles

It also owned excess outside valuation as follows: for 1917, \$1,019,582.15; for 1918, \$2,046,735.53. Its net railway operating income was as pleaded in said amended answer. Its total mileage for 1917 and 1918 was 337.27 miles both in and outside this state, and this sum is to be added to the total mileage of defendant.

For each year it reported to the State Tax Commission in its own name and was so taxed on the basis of the assessments set out in the [fol. 276] amended answer.

The defendant has owned and controlled the said C. N. O. & T. P. to the extent and as set out above and in its amended answer and former stipulation No. 5 is modified to the extent above indicated.

The C. N. O. & T. P. connected physically with the Southern Railway Company in Kentucky at Georgetown, Kentucky, Danville, Kentucky, Burgin, Kentucky, and Lexington, Kentucky.

3. It is further stipulated that plaintiff read on the trial the printed maps contained in the various stockholders' reports filed.

4. Former Stipulation No. 12 is erroneous.. But it is true that the Southern Railway Company of Virginia owned terminals, shops, double tracks outside the state of Kentucky which constituted an excess valuation, for 1917, \$80,160,065.06; for 1918, \$81,845,468.72.

5. Former Stipulation No. 19 is erroneous. But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at 75% and for 1918 85%.

Humphrey, Crawford & Middleton, Wallace & Harriss, Attorneys for Defendant. W. D. Jess, L. W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 277] IN CIRCUIT COURT OF WOODFORD COUNTY

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendants,
and

COMMONWEALTH OF KENTUCKY on Relation of ROBERT HAWKINS,
Sheriff of Woodford County, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY and JAMES C. DAVIS, Director General,
Defendants

SUBSTITUTED JUDGMENT—May 20, 1922

Pursuant to the mandate of the Court of Appeals, heretofore filed, the judgment entered in each of the above actions is now set aside and the cases are restored to the docket.

[fol. 278] It appearing that the term of Robert Hawkins as Sheriff of Woodford County, has expired and that Frank Bohannon, is now Sheriff of Woodford County, on his motion, said Frank Bohannon, as Sheriff of Woodford County is now substituted for said Robert Hawkins, as relator herein.

Hon. Robert L. Stout, the regular Judge of this court being unable to preside herein by consent of parties, these actions are submitted to Hon. Charles C. Marshall as Special Circuit Judge.

Came defendants in each of the above cases and tendered and moved to file amended answer to the filing of which plaintiff objected; the objection was overruled and the amended answer filed to which plaintiff excepted.

Came plaintiff in each case and filed reply to the amended answer and by consent the affirmative matter in said reply stands controverted of record.

Came parties and filed additional stipulations and the actions are submitted thereon and on the stipulations heretofore filed in this court and on the pleadings and exhibits for final judgment.

The court being sufficiently advised it is now adjudged that for the fiscal year beginning July 1, 1914, a part of the franchise of the defendant, the Southern Railway Company was omitted from [fol. 279] assessment and that the part so omitted was of value Nine Hundred and Seventy-two Thousand, Six Hundred and Sixty-two (\$972,662.00) Dollars and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1915. Said assessment is at the rate of Seven Thousand Six Hundred and Sixty-nine Dollars and seventy-five (\$7,669.75) cents per mile. County taxation will be in the following counties on the basis of the mileage therein as below set out:

Jefferson County.....	21.387 miles
Shelby County.....	24.299 "
Anderson County.....	20.092 "
Mercer County.....	22.049 "
Boyle County.....	2.000 "
Woodford County.....	21.185 "
Fayette County.....	8.206 "
Scott County.....	7.600 "

It is further adjudged that for the fiscal year beginning July 1, 1915, no part of the franchise of said defendant was omitted from assessment and that plaintiff take nothing by the petition for that year.

It is further adjudged by the Court, that for the fiscal year beginning July 1, 1916, a part of the franchise of the said Southern Railway Company was omitted from assessment and that the part so omitted was of value, two million eighteen thousand five hundred and sixty-one dollars, (\$2,018,561.00) and it is hereby assessed at [fol. 280] said sum for State and County taxation for said fiscal year ending June 30, 1917. Said assessment is at the rate of Fifteen Thou-

sand Nine Hundred and Sixteen Dollars and ninety-nine (\$15,916.99) cents per mile. County taxation for said year will be in the Counties and on the basis of the mileage for the fiscal year beginning July 1, 1914 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1914 and July, 1, 1916, the said defendant shall pay a penalty of twenty per cent on the amount of said State and County Taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

It is further adjudged by the Court that for the fiscal year beginning July 1, 1917 a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted from assessment was of value one million seven hundred and thirty thousand and ninety dollars (\$1,730,090) and it hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1918.

Said assessment is at the rate of Five Thousand Three Hundred and Thirty-four Dollars and fifty-five cents (\$5,334.55) per mile. County taxation will be in the following counties on the basis of the mileage therein as below set out:

Jefferson County.....	21.387 miles
Shelby County.....	24.299 "
Anderson County.....	20.092 "
[fol. 281] Woodford County.....	21.185 "
Kenton	14.37 "
Boone County.....	9.13 "
Grant County.....	22.45 "
Harrison County.....	2.43 "
Scott County.....	29.81 "
Fayette County.....	22.086 "
Jessamine County.....	15.94 "
Mercer County.....	30.189 "
Boyle County.....	12.42 "
Lincoln County.....	23.83 "
Pulaski County.....	30.99 "
McCreary County.....	23.71 "

It is further adjudged by the Court that for the fiscal year beginning July 1, 1918, a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted was of value Three Million and Twenty-eight Thousand Five Hundred and Ninety-two (\$3,028,592.00) Dollars and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1919.

Said assessment is at the rate of Nine Thousand Three Hundred and Thirty-eight dollars and thirty-four (\$9,338.34) cents per mile. County taxation for said fiscal year will be in the counties and on the basis of the mileage therein for the fiscal year beginning July 1, 1917 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on [fol. 282] July 1, 1917 and July 1, 1918, the defendants Southern Railway Company and John C. Davis, Director General of Railroads, shall pay a penalty of twenty-per cent on the amount of said State and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

As compensation for his services, Frank Bohannon, as Sheriff of Woodford County, the relator herein, is adjudged in both cases entitled to seventy-five per cent of the twenty-per cent penalty herein before adjudged to be paid on said State and County taxes. Said defendants shall pay the total twenty per cent penalty on all State and County taxes to the Auditor of Public Accounts and said Auditor shall pay seventy-five per cent thereof to said relator Frank Bohannon.

W. D. Jesse as County attorney of Woodford County, was present and assisted in the trial of these proceedings and he is allowed in both cases as compensation for his services fifteen per cent of the amount of said State and County taxes. Said fifteen per cent of the State taxes shall be paid to him by the Auditor when said taxes are paid. Said fifteen per cent of County taxes shall be paid to him by the Sheriff of the respective Counties when he collects said taxes and the remaining eighty-five per cent, shall be paid by the Sheriff to the County.

It is further adjudged that the Clerk of the Woodford County Court shall enter in the book kept by him for that purpose this Judgment, and he shall certify the assessment hereby made by the Court of the part of said franchise omitted as aforesaid and its value, as herein fixed, to the Auditor of Public Accounts, and the [fol. 283] apportionment thereof, to the County Clerk, and the Sheriff of each of the Counties above named.

It is further adjudged that in each of these actions the plaintiff recovers his costs and may have execution, etc.

To all of which in each case, the defendants except and pray an appeal to the Court of Appeals which is granted. This judgment is substituted for the judgment heretofore entered.

Chas. Marshall, Special Judge Woodford Circuit Court.

Have seen and may be substituted for original judgment.

Wallace & Harriss, Humphrey, Crawford & Middleton,
8/22/22; W. D. Jesse, Hazelrigg & Hazelrigg, L. W. Morris,
Hobson & Hobson.

[fols. 284-289] BOND ON APPEAL; Approved and Filed Aug.,
1922; Omitted in Printing

[fol. 290] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

SUPERSEDEAS—Filed Aug., 1922

I do certify that an appeal has been granted by the Woodford [fol. 291] Circuit Court from a judgment rendered at its May Term, 1922, in favor of Commonwealth of Kentucky on relation of Robert Hawkins, Sheriff of Woodford County, appellee, against Southern Railway Company and James C. Davis, Director General, appellants for:

"Pursuant to the mandate of the Court of Appeals, heretofore filed, the judgment entered in each of the above actions is now set aside and the cases are restored to the docket.

It appearing that the term of Robert Hawkins as Sheriff of Woodford County, has expired and that Frank Bohannon is now substituted for said Hawkins as relator herein.

Hon. Robert L. Stout, the regular Judge of this Court being unable to preside herein by consent of parties, these actions are submitted to Hon. Charles C. Marshall as Special Circuit Judge.

Came defendants in each of the above cases and tendered and moved to file amended answer to the filing of which plaintiff objected; the objection was overruled and the amended answer filed to which plaintiff excepted.

Came plaintiff in each case and filed Reply to Amended Answer and by consent the affirmative matter of said reply stands controverted of record.

Came parties and filed additional stipulations and the actions are submitted thereon and on the stipulations heretofore filed in this [fol. 292] Court and on the pleadings and exhibits of final judgment.

The Court being sufficiently advised it is now adjudged that for the fiscal year beginning July 1, 1914, a part of the franchise of the defendant, the Southern Railway Company was omitted from assessment and that the part so omitted was of value Nine Hundred and Seventy-Two Thousand Six Hundred and Sixty-Two Dollars (\$972,662) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1915. Said assessment is at the rate of Seven Thousand Six Hundred and Sixty-Nine and 75/100 Dollars (\$7669.75) per mile.

County taxation will be in the following Counties on the basis of the mileage therein as below set out:

Jefferson County.....	21.387	miles
Shelby County.....	24.299	"
Anderson County.....	20.092	"
Mercer County.....	22.049	"
Boyle County.....	2.000	"
Woodford County.....	21.185	"
Fayette County.....	8.206	"
Scott County.....	7.600	"

It is further adjudged that for the fiscal year beginning July 1, 1915, no part of the franchise of said defendant was omitted from assessment and that plaintiff take nothing by the petition for that [fol. 293] year.

It is further adjudged by the Court, that for the fiscal year beginning July 1, 1916, a part of the franchise of the said Southern Railway Company was omitted from assessment and that the part so omitted was of value, Two Million Eighteen Thousand Five Hundred and Sixty-One Dollars (\$2,018,561) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1917. Said assessment is at the rate of Fifteen Thousand Nine Hundred and Sixteen and 99/100 Dollars per mile. County taxation for said year will be in the Counties and on the basis of the mileage for the fiscal year beginning July 1, 1914 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1914 and July 1, 1916, the said defendant shall pay a penalty of twenty per cent on the amount of said State and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

It is further adjudged by the Court that for the fiscal year beginning July 1, 1917, a part of the franchise of said Southern Railway Company was omitted from assessment and that the part so omitted from assessment was of value One Million Seven Hundred and Thirty Thousand and Ninety Dollars (\$1,730,090) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1918.

Said assessment is at the rate of Five Thousand Three Hundred and Thirty-four and 55/100 Dollars (\$5,334.55) per mile. [fol. 294] County taxation will be in the following Counties on the basis of the mileage therein as below set out:

Jefferson County.....	21.387	miles
Shelby County.....	24.299	"
Anderson County.....	20.092	"
Woodford County.....	21.185	"
Kenton County.....	14.37	"
Boone County.....	9.13	"
Grant County.....	22.45	"
Harrison County.....	2.43	"
Scott County.....	29.81	"
Fayette County.....	22.086	"
Jessamine County.....	15.94	"
Mercer County.....	30.189	"
Boyle County.....	12.42	"
Lincoln County.....	23.83	"
Pulaski County.....	30.99	"
McCreary County.....	23.71	"

It is further adjudged by the Court that for the fiscal year beginning July 1, 1918, a part of the franchise of said Southern Rail-

way Company was omitted from assessment and that the part so omitted was of value Three Million and Twenty-eight Thousand Five Hundred and Ninety-Two Dollars (\$3,028,592) and it is hereby assessed at said sum for State and County taxation for said fiscal year ending June 30, 1919.

Said assessment is at the rate of Nine Thousand Three Hundred and Thirty-eight and 34/100 Dollars (\$9,338.34) per mile.

[fol. 295] County taxation for said fiscal year will be in the Counties and on the basis of the mileage therein for the fiscal year beginning July 1, 1917 above set out.

It is further adjudged that in addition to the State and County taxes levied and due for said fiscal years beginning respectively on July 1, 1917 and July 1, 1918, the defendants Southern Railway Company and John C. Davis, Director General of Railroads, shall pay a penalty of twenty per cent on the amount of said State and County taxes on said omitted assessments under this judgment which shall be collected and accounted for as other taxes.

As compensation for his services, Frank Bohannon, as Sheriff of Woodford County, the relator herein, is adjudged in both cases entitled to seventy-five per cent of the twenty per cent penalty herein before adjudged to be paid on said State and County taxes. Said defendants shall pay the total twenty per cent penalty on all State and County taxes to the Auditor of Public Accounts and said Auditor shall pay seventy-five per cent thereof to said relator Frank Bohannon.

W. D. Jesse as County Attorney of Woodford County was present and assisted in the trial of these proceedings and he is allowed in both cases as compensation for his services, fifteen per cent of the amount of said State and County taxes. Said fifteen per cent of the State taxes shall be paid to him by the Auditor when said taxes are paid. Said fifteen per cent of the County taxes shall be paid to him [fol. 296] by the Sheriff of the respective Counties when he collects said taxes and the remaining Eighty-five per cent shall be paid by the Sheriff to the County.

It is further adjudged by the Court that the Clerk of the Woodford County Court shall enter in the Book kept by him for that purpose this judgment, and he shall certify the assessment hereby made by the Court of the part of said franchise omitted as aforesaid and its value, as herein fixed, to the Auditor of Public Accounts, and the apportionment thereof, to the County Clerk, and the Sheriff of each of the Counties above named.

It is further adjudged that in each of these actions the plaintiff recovers his costs and may have execution, etc.

To all of which in each case, the defendants except and pray an appeal to the Court of Appeals which is granted."

[fol. 297] IN CIRCUIT COURT OF WOODFORD COUNTY

[Title omitted]

PRÆCIPUE FOR TRANSCRIPT OF RECORD—Aug., 1922

The Clerk will copy for the Court of Appeals the entire record in the two above cases since the return from the Court of Appeals including the Mandate of the Court of Appeals and notice of filing same.

He will make the Copy for the defendants and a carbon copy of it for the plaintiffs.

J. P. Hobson, Attorney for Plaintiff.

[fol. 298] IN CIRCUIT COURT OF WOODFORD COUNTY

CLERK'S CERTIFICATE

I, C. A. Witt, Clerk of the Woodford Circuit Court do hereby certify that the foregoing 58 typewritten pages contain a true, accurate and complete copy of the entire record since the return of same from the Court of Appeals in the two cases of the Commonwealth of Kentucky By &c. vs. Southern Railway Company and Commonwealth of Kentucky By &c. vs. Southern Railway Company &c. as the same now appears of record and on file in the office of the Clerk of the Woodford Circuit Court, according to memoranda entered on Minute Book in the above styled cases.

Witness my hand as Clerk of the Woodford Circuit Court this the — day of August, 1922.

C. A. Witt, Clerk Woodford Circuit Court, by Annie W. Witt, D. C.

[fol. 299] IN COURT OF APPEALS OF KENTUCKY

SOUTHERN RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON, Sheriff of Woodford County, Appellees,

and

SOUTHERN RAILWAY COMPANY and JAMES C. DAVIS, Director General of Railroads, Appellants,

vs.

COMMONWEALTH OF KENTUCKY, by FRANK BOHANNON, Sheriff of Woodford County, Appellees

STATEMENT ON APPEAL

The parties, appellant and appellee, are as above set out. The judgment appealed from was rendered at the May term of the Wood-

ford Circuit Court, and is found on page 38 of the transcript. The appeal was granted below and no process is necessary. The attorneys for the appellants are Ed Wallace, Versailles, Kentucky, and Humphrey, Crawford & Middleton, Louisville, Kentucky. The attorneys for the appellees are W. D. Jesse, Versailles, Kentucky, and L. W. Morris, Hazelrigg & Hazelrigg, and Hobson & Hobson, of Frankfort, Kentucky.

J. P. Hobson, for Appellee.

[fol. 300] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

SUBMISSION OF MOTION TO HEAR CASES TOGETHER—Sept. 18, 1922

Came appellant by counsel, and filed brief and motion for oral argument. Came parties by counsel, and filed motion to hear these cases together, and to advance under Rule VI. Which motions are submitted.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER GRANTING MOTION TO HEAR CASES TOGETHER—Sept. 20,
1922

The Court being sufficiently advised, it is considered that appellee's motion to hear the above appeals together, and to submit and advance under Rule VI, be and the same is hereby sustained. It is further ordered that Appellant's motion for oral argument, be and the same is hereby overruled.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JUDGMENT—June 13, 1924

The Court being sufficiently advised, it seems to them the judgment herein, is erroneous in part.

It is therefore considered that the judgment in the first case, in so far as it relates to the years 1914 and 1916 be reversed, and the judgment in the other case relating to 1917 and 1918, is affirmed. Which is ordered to be certified to said Court.

[fol. 301] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—Filed June 13, 1924

Judge CLARKE, reversing in the first and affirming in the second of these cases:

[fol. 302] Upon former appeals of these cases, we held that "in each of the years involved, (1914-1918 inclusive), defendant Southern Railway Company, (a Virginia corporation), was the owner of and actually operated the lines of the 'Southern Railway Company in Kentucky,' " and as a consequence, the lower court "should have assessed against defendant Kentucky's portion of its intangible property" on the mileage basis, as provided by section 4081 Kentucky Statutes.

As there had been no attempt to make the assessments, the cases were remanded to the circuit court, with directions "that it proceed to ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky according to the prevailing rule of law upon the subject." *Commonwealth v. Southern Railway Co.*, 193 Ky. 474, 237 S. W. 11.

Upon the return of the cases, the defendant filed amended answers, and upon stipulated facts, the court found that for 1915 Kentucky's portion of defendant's franchise had been fully assessed by and in the name of the Southern Railway Company in Kentucky, and that the value of its franchise employed in Kentucky not so assessed for each of the other years involved was as follows:

1914, \$972,662; 1916, \$2,018,561; 1917, \$1,730,090;
1918, \$3,028,592.

Judgments were entered accordingly, and the defendant has prosecuted an appeal in both cases, the first of which relates to the years 1914 and 1916, and the second to the years 1917-18, but it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion herein, and the judgment in that case will therefore be affirmed without further discussion.

[fol. 303] The grounds upon which we are urged to reverse the judgment in the other case relating to the years 1914 and 1916 are, that for those years there was no such unity of use and operation between defendant's line in Kentucky and its lines outside of the state as to permit the assessment of its franchise, as was done, upon the theory that all of its owned and controlled lines, in and out of the state, constituted a single system; that as a matter of fact its line in Kentucky for such years had neither physical nor operative connection with lines outside of the state, unless it be with its line running from New Albany, Ind. to East St. Louis, Ill., and that to apply the notion of organic unity to all of its lines under such

circumstances is violative of the Fourteenth Amendment of the Constitution of the United States, in that it brings into Kentucky for taxation purposes values wholly outside of the state. Whether or not this is true is the sole question presented for decision upon these appeals.

The first contention, upon which there is but little if any emphasis, is that defendant's line in Kentucky is not connected with its line from Louisville through Indiana and Illinois to St. Louis, because of the fact the latter enters Louisville from New Albany, Indiana, over tracks of the Kentucky & Indiana Terminal Railroad Company. It is stipulated, however, that the latter company is equally and jointly owned by the defendant and two other railroad companies using its tracks and other terminal facilities at Louisville, and that the defendant operates through trains under a single management from St. Louis, Missouri, through Louisville to Danville, Kentucky, and we are sure that there is not only such unity of use and control but also a sufficient physical unity, if that were required, as [fol. 304] to warrant defendant's line from St. Louis to Danville, Ky., being regarded as a single unit, and that it would not be violative of the Fourteenth Amendment of the federal Constitution to assess its franchise in Kentucky upon the mileage basis, treating these lines in and out of Kentucky as a single system. *L. & N. R. Co. v. Commonwealth*, 181 Ky. 193, 204 S. W. 94; *L. & N. R. Co. v. Greene*, 244 U. S. 522; *Pittsburgh v. Backus*, 154 U. S. 431; *Fargo v. Hart*, 193 U. S. 499.

But according to our understanding of the record if this should be done and other lines owned by defendant excluded, the defendant has already, through the assessment made by and in the name of the Southern Railroad Company in Kentucky, assessed the full value of its franchise employed in the state for each of these two years, and the assessments fixed by the lower court can be sustained only if the 566 miles embraced in the St. Louis-Danville line are considered as a part of a system embracing also about 8,000 miles of lines owned, operated, leased, and controlled by the defendant, and extending from Washington, D. C., south through Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama, and Mississippi.

The question for decision then finally narrows to whether for the purpose of valuing defendant's franchise employed in Kentucky, the line from Danville, Kentucky, to St. Louis, Missouri, is to be considered as a separate unit or as a part of a system including also defendant's eastern and southern lines. For convenience we shall refer to the former as the Northern branch and the latter as the Southern branch of defendant's lines.

It is admitted that these two branches, for the years 1914 and 1916, had no physical connection with each other, unless it be [fol. 305] through the Mobile & Ohio Railroad Company, of which the defendant owns a majority of the capital stock, and which connects with defendant's Northern branch at East St. Louis, Ill., and with its Southern branch at Mobile, Ala. With reference to this company, there are the following stipulations in the record:

"It is agreed that the traffic manager of the M. & O.—will state that the traffic affairs of the said M. & O.—were as separate and distinct from those of this defendant and administered as independently thereof as those of the I. C. Railroad Company or the L. & N. Railroad Company or any other line, and its policy was determined alone by what was to the best interest of the said M. & O. Railway Company."

"The M. & O. gives to the competitors of the Southern Railway more business than it gives to the Southern Railway Company."

So that while it is true defendant owned the majority of the stock of the M. & O., it stands admitted that such stock control was not employed by the defendant to unite the M. & O. with other lines owned by it, and that for each of such years it was operated separately and independently from defendant's other two branches.

Defendant, in 1917, acquired the C. N. O. & T. P. Railway Co., and thus connected its Northern branch at Danville, Lexington, and Georgetown, Ky., with its Southern branch at Harriman and Chattanooga, Tenn., but for the years 1914 and 1916:

"It is agreed that the traffic manager of the C. N. O. & T. P. Ry. Co.—will state that the traffic affairs of the said C. N. O. & T. P. Ry. Co.—were as separate and distinct from those of this defendant and administered as independently thereof as those of the I. C. Railroad or the L. & N. Company or any other lines, and its policy [fol. 306] was determined alone by what was to the best interest of the C. N. O. & T. P. R. R. Company."

As a result of these stipulations, it necessarily follows, it seems to us, that there was in fact no physical connection between the Northern branch and the Southern branch of the defendant's lines, and that despite the defendant's ownership and control of both of these separate branches, they cannot, under the many decisions of the Supreme Court of the United States, be considered as parts of a single system for the purpose of ascertaining the value of defendant's franchise employed in Kentucky without violating the Fourteenth Amendment of the federal Constitution.

As was stated in *Wells Fargo v. Hart*, supra; "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction, although belonging to persons domiciled elsewhere, and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even through the other parts of the system are outside of the State."

But as a state can under no formula tax things wholly beyond its jurisdiction, it has always been recognized that the mileage system or apportionment for taxation can never be used where special

circumstances exist to distinguish between the conditions in and out of the taxing state, and so it has been held that terminal [fol. 307] facilities and other property of unusual value, whose situs is capable of being localized, are not to be considered as parts of the apportionable entity. *P. C. C. & St. L. V. Backus*, 154 U. S. 421; *I. C. R. R. Co. v. Green*, 244 U. S. 555; *Wallace v. Hines*, 253 U. S. 66.

It also has been held that where the system basis is shown to be arbitrarily excessive, it cannot be adopted. *Union Tank Line v. Wright*, 249 U. S. 277.

It is true, as urged by counsel for appellant, that in all of the cases where this notion of organic unity has been applied to a railroad in assessing the value of its franchise in one of the several states to which its lines extend, the entire mileage has constituted a single continuous road, and in some of the cases that fact has been referred to, but we do not construe any of the cases to mean that it is necessary that there shall be physical continuity to warrant the application of the principle. Indeed in the case of *Adams Express Co. v. Ohio*, 165 U. S. 194, upon which appellee relies, the principle was applied where there was an absence of physical unity. It was there held:

"The unit is a unit of use and management," and after pointing out that the Express Company's tangible and separated property in Ohio "possessed a value in combination and from use in connection with" its property and capital located elsewhere, the court said:

"We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner but existing in the very necessities of the case—resulting from the very nature of the business."

[fol. 308] So while that case disposes of the necessity of physical unity, it does not fit our case because although there was a unity of ownership and management of the two branches of defendant's lines, there was not such a unity of use as is above indicated there must be; and it is not perceivable how the property in Kentucky, or defendant's Northern branch of which it is a part, "possessed a value in combination and from use in connection with" the defendant's wholly disconnected Southern branch, until in 1917 when defendant acquired the C. N. O. & T. P. Ry. Co., and thus unified all of its holdings into a single unit of use and management.

The court, in *Wallace v. Hines*, *supra*, probably more clearly than elsewhere, has defined the limits of the permissible use of the organic unity system of assessment, as well as the reason therefor, as follows:

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose

the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.”

It therefore follows that, although our statute (4081) is broad enough to permit an assessment of defendant's franchise in Kentucky [fol. 309] upon a mileage system of unity including all of its lines “owned, leased, or controlled in this state and elsewhere,” it may not be so broadly applied, or except where “it can be seen in some plain and fairly intelligible way” that its property elsewhere “adds to the values of the road and the rights exercised in the state,” which is not true here.

Wherefore the judgment in the first case, in so far as it relates to the years 1914 and 1916, is reversed, and the judgment in the other case, relating to 1917 and 1918, is affirmed.

Humphrey, Crawford & Middleton, Louisville, Kentucky; Wallace & Harriss, Versailles, Ky., attorneys for appellant.

W. D. Jessee, Versailles, Ky.; L. W. Morris, Frankfort, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky.; Hobson & Hobson, Frankfort Ky, attorneys for appellee.

[fol. 310] Afterwards at a Court of Appeals, held as aforesaid on the 1st day of July 1924, the following order was entered, to-wit:

SOUTHERN RAILWAY CO.

v.

COMMONWEALTH, by, etc. (2 cases)

Woodford

Came parties by Counsel and filed joint motion that appellant be granted thirty days from July 1, 1924 to file a petition for rehearing. Which motion is submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky, as aforesaid the following order was entered:

SOUTHERN RAILWAY CO.

v.

COMMONWEALTH, by, etc.

Woodford

Came appellant by counsel and filed a petition for rehearing.

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR REHEARING OR MODIFICATION OF OPINION

The Court may recollect that there were two cases, which were agreed, however, to be heard together. In one of them the Commonwealth asked an assessment against the Southern Railway Company for the fiscal years ending June 30, 1915, 1916 and 1917; and in the other asked an assessment against James C. Davis, Director General, [fol. 311] and the Southern Railway Company, for the fiscal years ending June 30, 1918 and 1919. The original opinion in this case, reported *Commonwealth of Kentucky v. Southern Railway Company*, 193 Ky. 474, held that the Southern Railway Company, the Virginia corporation, in effect owned and operated the lines of the Southern Railway Company in Kentucky, and that the lines of the Southern Railway Company in Kentucky were part and parcel of the Southern Railway Company, the Virginia corporation, system. The judgment of the lower court which had dismissed the proceedings was reversed with directions to make an assessment based upon the above proposition, namely, that the Southern Railway Company, of Virginia, so owned and operated the lines of the Southern Railway Company in Kentucky as to make these lines a part of its system. In pursuance to the mandate an assessment was made by the lower court, and James C. Davis, Director General, and the Southern Railway Company, appealed, and these cases were heard together in this court. The result of the last opinion in this court is to hold that for the fiscal years 1915, 1916 and 1917 there could be no additional assessment based upon the proposition that the Southern Railway Company was a part of the Southern Railway Company, of Virginia's system, because as during these years the Southern Railway Company, the Virginia corporation, did not own or control, either directly or indirectly, a majority of stock in the C. N. O. & T. P. Railroad, there was no connection between the Southern Railway Company's Southern system and the lines from Danville, Kentucky, to St. Louis, Missouri, and the earnings from these lines did not justify any additional assessment. The judgment making an assessment for these years was therefore reversed with directions to dismiss that petition. But the Court affirmed the assessments made for the fiscal

years ending June 30, 1918, and June 30, 1919, against James C. Davis, Director General, and the Southern Railway Company, as during that period the Southern Railway Company did own or control a majority of stock in the C. N. O. & T. P. and therefore there was a connection between the system of the Southern Railway Company in the South and the Southern Railway Company in Kentucky, [fol. 312] Indiana and Illinois.

We cannot, of course, attempt to reargue the principles laid down in the opinion reported in *Commonwealth of Kentucky v. Southern Railway Company*, 193 Ky. 474, as under a well-established rule of this Court this opinion became the law of the case. There are, however, some matters, not settled by that opinion, and not settled by the new opinion, to which we desire to call attention:

(1) The judgment of the Court below made an assessment against James C. Davis, Director General and the Southern Railway Company for the fiscal years ending June 30, 1918 and 1919, these being the years in which the Director General had possession of the lines of the Southern Railway Company. This possession was pleaded in the original answer in that case, and a denial was made of any duty on the part of the Southern Railway to report for either of these years. We submit that this assessment should not have been made against the Southern Railway Company, but against James C. Davis, Director General, only, as there could have been no dereliction of duty upon the part of the Southern Railway Company in failing to report during the time when its property was in the hands of the Director General, and the Southern Railway had no books or accounts showing what were the earnings and expenses. We therefore ask a modification of the opinion so as to direct that the case be reversed with directions to dismiss it so far as the Southern Railway Company, of Virginia is concerned. We believe this is settled by the cases of *Commonwealth v. L. & N.*, 189 Ky. 309, and *Rogers v. Hines*, 193 Ky. 795. We will hereafter set out the statutes on this subject as relating specially to taxes in connection with another matter.

(2) The court below not only made an assessment for the fiscal years ending June 30, 1918, and June 30, 1919, against the Director General and the Southern Railway Company, but fixed a penalty to be paid by both of these defendants upon the taxes due under this assessment. We respectfully submit that so much of the judgment as affixed this penalty cannot stand, as not being embraced within a proper construction of the Federal statute relative to taxes during Government operation.

[fol. 313] It may be remembered that possession of the railroads was taken December 28, 1917, as of December 31, 1917, under a proclamation of the President. An Act was subsequently passed, approved March 21, 1918, governing the conduct of this Federal administration (40 Stat. at Large, 457, 1 Supp. Com. Stat. 1919, page 758). This Act provided, among other things, for compensation to be paid by the Government to the railroads. This compensation was to be fixed by a contract, or if not by a contract, then by partial payments during Federal control and a final settlement. The follow-

ing provisions were made in regard to taxes. This is from Section 1 of the Act:

"Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation."

Section 15 of the Act provides, as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

These taxes for 1917-1918 and 1918-1919 are therefore Government liabilities and not a liability of the corporation and therefore, as we have stated above, the opinion of the Court should be modified so that in affirming the judgment of the Court below it shall be affirmed as to the Director General, but reversed as to the Southern Railway Company.

[fol. 314] In regard to the penalty, a binding authority on this subject, we submit, is that of *Missouri Pacific Railroad Co. v. Ault*, 256 U. S. 554. This case discusses very fully the language and the construction of the Act of Congress quoted as fixing the liability for everything that occurs during Government control under the Director General and as relieving the railroad companies from such liability. The opinion contains a discussion not only of the Act, but of Order No. 50 adopted by the Director General, and is exactly in line with the Kentucky case which we have above cited, namely, *Commonwealth v. L. & N. R. R. Co.*, 189 Ky. 309, and *Rogers v. Hines*, 193 Ky. 795. In the case just cited, *Missouri Pacific Railroad Co. v. Ault*, 256, U. S. 554, the question of the liability of the

Director General for a penalty is fully dealt with. In this case it appears that a statute of Arkansas provided that whenever a railroad company discharged an employe, with or without cause, the railroad company should pay the discharged employe the wages due him within seven days of the discharge. Further, that if payment was not made within the above time, "then as a penalty for such non-payment, the wages of such servant or employe shall continue from the date of the discharge or refusal to further employ at the same rate until paid." In August, 1918, Ault brought suit against the railroad company, alleging that he had been employed by the company at the rate of \$2.50 per day; that he had been discharged on July 29, 1918, and that \$50.00 was then due him as wages but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court of the State and there moved in January of 1919 to substitute as the defendant the Director General of Railroads. The Court refused to make this substitution, but joined the Director General as a party defendant and rendered judgment against both the Director General and the railroad company upon a verdict that Ault recover the sum of \$50.00 due him as wages and \$390.00 as penalty. The judgment was affirmed by the Supreme Court of Arkansas. The case was taken to the Supreme Court both on writ of error and certiorari. After passing on the merits of the case [fol. 315] the Court said the following with regard to the proper form of appeal.

"The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied."

The court held that the judgment for the \$50.00 should have been solely against the Director General and not against the railroad. In holding that the penalty could not be imposed on the Director General, the Court said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in Sec. 10 to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,' and the provision in Sec. 15 that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribe how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person

injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The Director General adopted a much more effective and direct method: 'Now that the railroads are in possession and control of the Government, it would be futile to impose fines for violations for said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishment for willful and inexcusable violations thereof upon the person or persons responsible therefor.' General Order No. 8, *Id.*, p. 167.

"The purpose for which the Government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, 'provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' (Our italics.) Wherever the law permitted compensatory damages they may be collected against the carrier under Federal control. Such damages may reasonably include interest and costs. See *Hines v. Taylor*, 79 Florida, 218. But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines v. Taylor*, *supra*; *Jackson-Tweed Lumber Co. v. Southern Ry. Co.*, 113 S. Car. 236. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: 'It is [fol. 316] allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' *Leep v. Railway Co.*, 58 Arkansas, 407, 440-441. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of Federal law. Whatever name be applied, the element of punishment clearly predominated and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous.

"The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied. Judgment reversed."

This question was again before the Supreme Court of the United States in the case of *Norfolk-Southern R. R. Co. v. Owens*, 254 U. S. 565. The opinion is very short, and is as follows:

"This case comes here on writ of certiorari (251 U. S. 550) to the Supreme Court of North Carolina, which affirmed (178 N. Car. 325)

a judgment of \$21 against the Norfolk-Southern Railroad Company in favor of Owens, a shipper. The amount was assessed under a statute of the State as a penalty for undue delay in making delivery of an intrastate shipment made March 27, 1918. At that time the railroad was in the possession and control of the Government, and was being operated by the Director General under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. The only question presented for decision is whether the company was liable for the penalty. We are of opinion that it was not, for the reasons stated in *Missouri Pacific R. R. Co. v. Ault*, decided this day, ante. 554." That this twenty percent is a penalty appears from the statute itself—4241 Ky. Stat. Thus it is said in this statute:

"All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof."

In the case of *Bank of Kentucky v. Commonwealth*, 107 S. W. 812, 32 Ky. L. R. 1087, there is a full discussion of the question as to what amount a delinquent taxpayer shall pay. It is there held that the amount of the taxes assessed shall bear interest at six per cent. The Court goes on to consider what is the amount to be paid on account of the penalty. On this subject this Court said:

"The penalty of 20 percent is given by the statute on the amount of the taxes due. A 20 per cent penalty on the taxes and interest is not allowed. The agent filing the statement is entitled to the penalty of 20 per cent. He gets this in all cases whether long or short. He takes the bad with the good. What the taxpayer owes is the taxes. A penalty of 20 per cent is added for his delinquency, and, under the rule above referred to, the taxes in cases like this bear interest at 6 per cent where the collection of the money is prevented by the taxpayer by legal proceedings; but we know of no principle justifying us in adding interest to the penalty. The rule is that penalties do not bear interest, and it seems to us it would be a harsh rule to add a penalty of 20 per cent to the taxes and then make both penalty and taxes bear interest at 6 per cent. This would be to make the cost of legal proceedings to test the legality of assessments oppressive, when unsuccessful, and such an additional penalty for delay cannot be enforced without statutory authority. If the penalty as well as the taxes went to the State, it would hardly be maintained in the absence of a statute that the penalty of 20 per cent should be added to the taxes and that after this both the penalty and the taxes should bear interest at 6 per cent. The fact that the State pays its agent by giving him the penalty adds nothing to the penalty. The liability of the taxpayer is not affected by the way the State pays its officer.

"We therefore conclude the appellant must pay interest on the taxes, but not on the penalty."

We respectfully request, therefore, that a re-hearing be granted or that the opinion be modified by directing a reversal of the second case, that is, the case relating to the taxes during Government control shall be reversed with directions to dismiss the proceedings so far as the Southern Railway Company is concerned, and to modify the judgment against the Director General by striking out the provision in regard to penalties.

Respectfully submitted, Humphrey, Crawford & Middleton,
Wallace & Harris, Attorneys for Appellants.

[fol. 318] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

RESPONSE TO APPELLEE'S REPLY TO PETITION FOR REHEARING OR
MODIFICATION OF OPINION

It is not our purpose to elaborate on the points heretofore made in our Petition for Rehearing or Modification of Opinion, nor do we deem it necessary to respond to appellee's reply thereto further than to call the attention of the court to the fact that the case of St. Louis and San Francisco Railroad Company v. Middlekamp, 256 U. S. 226, relied on by appellee is not in point.

[fol. 319] It will be recalled that in our Petition for Rehearing two points were made:

1. That the judgment for the years during which the railroad was being operated by the Director General should have been against that officer alone, and that the inclusion of the Southern Railway Company in this judgment was erroneous.

2. That no penalty could be assessed against the Director General.

The Middlekamp case above referred to is cited in opposition to the first point.

However, the Middlekamp case is not contra to the first point and is not authority in this case, because the tax discussed in that case was not such a tax as the Government obligated itself to pay when it took over the railroads. The tax there assessed was simply an excise tax on the corporations' "right to be," and not a tax on the property of the railroad or its right to operate as a carrier.

Before going further, it is well to call the court's attention to the fact that the word "franchise" as used in tax matters and with regard to corporations is frequently misused, so that the mere fact that the word "franchise" may be used in a certain tax matter is no indication that it means the same as it does in another different case. We also call the court's attention to the fact that corporations have two franchises, known as:

1. Corporate or general franchises.
2. Special or secondary franchises.

By the first franchise is simply meant the right of the corporation "to be." By the second franchise is meant those certain rights or special privileges which it may possess.

Fletcher, *Cyclopedia, Corporations*, vol. 2, page 2107:

"For practical purposes, franchises, so far as relating to corporations, are divisible into (1) corporate or general franchises and (2) special or secondary franchises. The former is the franchise to exist as a corporation, while the latter are certain rights and privileges conferred upon existing corporations, such as the right to use the streets of a municipality to lay pipes or tracks, erect poles or string wires."

P. 2109: "Corporate or General Franchise. The franchise to exist as, or be, a corporation, ordinarily called the corporate franchise, is a separate and distinct form of franchise. This franchise is also referred to as the 'primary' franchise."

"This 'General franchise' of a corporation as it is sometimes called, [fol. 320] is its right to live and to do business by the exercise of the corporate powers granted by the State."

P. 2114: "Special or Secondary Franchise. All of the franchises possessed by a corporation, except the franchise to be a corporation which belongs to the incorporators, are included in what are known as special or secondary franchises. For instance, the decisions hold that the franchise of a railroad corporation to exist as a corporation is a general franchise, while its right, even when conferred by the same statute, to construct and maintain a railroad, is a special franchise."

The tax involved in the Middlekamp case is a tax on this primary franchise, that is on the corporation's right "to be," and is in no sense a property tax such as is the franchise tax involved in the present case. It was therefore not such a tax as the Government obligated itself to pay when it took possession of the railroads.

The Act of Congress taking over the railroads, copied on page 5 of our Petition for Rehearing, provided as follows:

* * * ; "that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control * * * ." (40 Stat. at Large, 457, 1 Supp. Com. Stat. 1919, page 758.)

In other words, the Government obligated itself to pay the tax on the railroad property and the tax on the right to use such property as a carrier. It was obviously correct for the Government to pay such taxes because when it took over the railroad it took over the physical property of the corporations, and it also took over the

right of such corporations to act as carriers. While the Government had possession the corporations did not have any use of the property which they owned and had no right whatever to operate as a carrier. Therefore such taxes should be paid by the Government.

On the other hand, the Government did not take over the corporation itself. The corporation continued as such, and its rights "to be" was not affected by the Government's operation of the railroads. Therefore any tax imposed on the corporation's right "to be," or, in other words, on the primary franchise of the corporation, should [fol. 321] be paid by the corporation itself. It was so held in the Middlekamp case. Such holding is obviously correct, but is no authority for the proposition that the corporation is liable for a tax on the property of the corporation while it was under Federal control.

We have seen that under the Act the Government made itself liable for taxes on the property of the corporation and on the right to operate as a carrier. The tax imposed in the present suit was levied under Kentucky Statutes, #4077, and while commonly called a franchise tax, it has been held to be a property tax.

C. & O. v. Commonwealth, 190 Ky. 552, 228 S. W. 15:

The court, referring to taxes imposed by #4077, says:

"The franchise tax is a property tax and is nothing more than the taxation of all the corporation's intangible property, including its capital."

To the same effect see:

Commonwealth v. Southern Pacific Co., 144 Ky. 803;
Henderson Bridge Co. v. Commonwealth, 99 Ky. 623;
L. & N. v. Greene, 244 U. S. 522-535.

Since therefore the franchise tax in the present instance is a property tax, that is, a tax on the intangible property, it comes directly within the language of the Act of Congress obligating the Government to pay for taxes on the property used under Federal control.

Obviously this intangible property tax should be assessed against the Government because such intangible property value only arose on account of the use of the tangible property by the Government in the business of a public carrier.

James v. Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468:

"An examination of #4077, Kentucky Statutes, 1903, shows a classification of certain kinds of business, engaging in any of which is deemed the exercise of such a privilege, as that it is reckoned as property, because it gives to the more familiar forms of property employed in the business a peculiar earning value which it would not otherwise have."

Furthermore this franchise tax provided for in #4077, Kentucky Statutes, is never imposed except as attendant upon tangible property.

[fol. 322] James v. Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468;

"It will be observed that it (the tax provided in #4077, Kentucky Statutes) is never taxed unless property otherwise taxable is employed in the designated occupations; nor is it ever taxed independent of or without reference to tangible property to which it is by this statute annexed."

Since, therefore, the franchise tax in the present case is a property tax, that is, a tax on the intangible property of the corporation, and since this intangible property only has a value on account of the use of the tangible property, which the Government had possession of and was operating, it is plainly such a property tax as should be assessed against the Government under the Act of Congress quoted supra.

Coming now to the Middlekamp case, 256 U. S. 226, it will be observed that the tax involved in that case is one imposed by the statutes of Missouri upon domestic corporations, Laws of 1917, page 237. The Act is copied with the Supreme Court opinion and provides:

"Every corporation organized under the laws of this State shall, in addition to all other fees and taxes now required to be paid, pay an annual franchise tax to the State of Missouri equal to three-fourths of one per cent of the par value of its outstanding capital stock and surplus * * *."

While denominated a franchise tax, just as is the tax imposed by #4077, Kentucky Statutes, it is apparent from a reading of the Act that the word "franchise" used in the Missouri Act does not have the same meaning as when employed in connection with #4077 of our Kentucky Statutes. The Missouri Act imposed a tax on the primary franchise of the corporation, that is, on its right "to be," and is not a property tax as is the franchise tax imposed by #4077.

In *State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, et al.*, 221 S. W. 721, the Supreme Court of Missouri had under consideration the identical tax Act involved in the Middlekamp case.

"This is a proceeding by writ of certiorari issuing out of this court, upon the petition of the Marquette Hotel Investment Company, against the state tax commission, to determine the amount of tax due from relator under the act commonly known as the Franchise Tax Act. Laws of Missouri 1917, p. 237."

In passing on this tax the court unequivocally held that it was not [fol. 323] a property tax, as follows:

"WILLIAMSON, J. (after stating the facts as above): The statute in question is denominated a franchise tax in the title and in the first section of the act. In relator's brief the first point made is that this is a 'franchise tax and not a tax upon property.' Respondent in its brief states that it 'readily agrees with relator that the franchise tax is not a property tax.' Since the law-making body and the contending parties are agreed upon this point, we think we may safely assume that this is a franchise tax, and so dispose of relator's contention No. 1."

It will be observed that the Missouri Franchise Tax Act is imposed on every domestic corporation; in other words, it is a tax on the primary franchise of the corporation, that is, simply on the corporation's right "to be."

The Middlekamp case was tried originally in the District Court of the United States for the Central Division of the Eastern District of Missouri before three judges. The opinion of these three judges rendered June 29, 1920, and from which the appeal was taken to the Supreme Court, construed the Missouri statute as an excise, and not a property tax. We make the following quotation from the opinion of the three judges in the District Court:

Per CURIAM:

"This case came on for hearing upon an application for a temporary injunction, before Kimbrough Stone, Judge of the Circuit Court of Appeals of the Eighth Judicial Circuit, Arla S. Van Valkenburgh, Judge of the District Court of the United States for the Western District of Missouri, and Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa.

"Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of said State.

"Defendant George H. Middlekamp is the Treasurer of the State of Missouri, and Frank W. McAllister is the Attorney General of said State.

"(1) By this petition in equity, the plaintiff challenges the validity and constitutionality of a certain Act of the Legislature of the State of Missouri, approved April 9, 1917, which Act provides for a 'franchise tax' upon every corporation organized under the laws of the State of Missouri equal to 3-40 of one per cent of the par value of such corporation's outstanding capital stock and surplus; or if part of its capital stock is employed in business in another state or country, a tax equal to 3-40 of one per cent of its capital stock employed in [fol. 324] the State of Missouri. Provisions is also made for payment of a like tax by corporations not organized under the laws of the State, but doing business within the State. The details of the Act will be hereafter more fully referred to.

"(2) The Nature of This Tax.—A careful reading of the entire statute convinces us that the tax provided for is an excise tax—not a property tax. This is apparent not only from the language used, but

from the further fact which appears, of record, that the State of Missouri before the enactment by the Legislature, imposed taxes upon property, tangible and intangible, including the value of franchises, such as the right of way, depot grounds, etc.

"Furthermore, the Supreme Court of Missouri, construing this Missouri statute (*State of Missouri, ex rel., v. The State Tax Commission, et al.*, filed April 9, 1920, and *id.* upon rehearing, filed May 18, 1920) specifically holds that this Act does not provide for a property tax. It is designated as a 'franchise tax,' which as applied herein, we think is better described as an 'excise tax.' This term avoids confusion with the tax properly levied upon franchises as property. The construction by the Supreme Court of Missouri of the language of the Legislature of Missouri, should not only be followed by this court, but we concur with the views of the Supreme Court of Missouri in the construction which they have placed upon the language of the Act. It is quite apparent that the Legislature in good faith attempted to impose an excise tax."

A Kansas Act similar to the Missouri Act was involved in the case of *Kansas City Railway v. Kansas*, 240 U. S. 227, and was held by the Supreme Court to be a tax on the corporation's right "to be."

P. 230. "By Chapter 135 of the Laws of 1913, of Kansas, every domestic corporation is required to pay to the Secretary of State an annual fee which is graduated according to the amount of its paid-up capital stock."

This Kansas Act was held to be a tax on the corporation's right to be and was thus upheld by the court:

P. 232: "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

We submit therefore that the tax imposed in the *Middlekamp* case is an excise tax on the corporation's right "to be," and that therefore it was such a tax as the corporation should have paid, and [fol. 325] the decision of the Supreme Court so holding is not in point in the instant case. Here we are dealing with a property tax which the Act of Congress provides shall be paid by the Government.

The insinuation is thrown out in appellee's response that the State might possibly lose its tax were the assessment against the Director General alone. We cannot think that the Commonwealth of Kentucky means to be in the position of claiming that the Federal Government would repudiate a tax obligation which it has obligated

itself to pay. Furthermore this Court knows as a matter of judicial knowledge that during the Federal control, the Federal Government did pay all of the tangible and intangible property taxes on all of the railroads operating in Kentucky. The answer filed by the Director General, and not denied, alleges that during the operation of the railroad by Federal control the Director General filed the reports and paid the tangible and intangible taxes of the several railroads referred to in the original petition of the Commonwealth.

In conclusion we submit that:

1. Since the tax in the present case is a tax on property it is an obligation of the Federal Government during its operation of the railroad, and in no event can the railroad corporation itself be made liable for it, since during the years involved the railroad corporation did not have possession of its property or the right to operate as a carrier.

2. The Middlekamp case being a tax simply on the primary franchise corporation, that is its right "to be" and not being a tax on property either tangible or intangible, the tax was properly assessed against the railroad corporation itself, and the case is not in point in the present instance.

Wherefore we respectfully request as in our original petition for rehearing on modification of opinion that a rehearing be granted or that the opinion be modified by directing a reversal of the second case, that is the case relating to the taxes during Government control shall be reversed with directions to dismiss the proceedings so far [fol. 326] as the Southern Railway Company is concerned and to modify the judgment against the Director General by striking out the provision in regard to penalties.

Respectfully submitted, Humphrey, Crawford & Middleton,
Wallace & Harris, Attorneys for Appellants.

COURT OF APPEALS OF KENTUCKY

[Title omitted]

REPLY TO APPELLANT'S PETITION FOR REHEARING

1. As to Judgment Against Southern R. Co.

The case of Missouri Pacific R. Co. vs. Ault, 256 U. S. 554, which is the basis of the petition is wholly unlike this case. [fol. 327] Ault had never been in the employment of the Missouri Pacific R. Co. He was employed by the director general after he took charge of the railroad and was never in the service of the company in any way. He was discharged by the Director General and \$50.00 of his wages were not paid to him. He got a judgment for \$50.00 with interest at six per cent from the time the money was due him and

a penalty of \$390.00 for its non-payment when due against the director general who employed him and against the company who never employed him and was under no liability to him.

That is not by any means this case. This is a proceeding to secure the payment of taxes due the State of Kentucky. These taxes are a lien on the property of the Company and the person in possession of the property when the taxes are assessed is liable for the taxes under the express provision of the statute, which is in these words:

"The Commonwealth and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively (for five years) which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale."

Kentucky Statutes, Sec. 4021.

"The holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the first day of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

Ky. Statutes, Sec. 4023.

The assessment here was directed to be made May 20, 1922. (record p. 38). The liability was not fixed and no assessment could be made until that judgment was entered. At that time federal control had terminated and the property was in the possession of the railroad company. It was its property and in its possession. The state had then a lien on the property for the taxes so directed to be assessed and the claimant in possession is liable for the taxes. The court takes judicial notice when federal control began and when it ceased.

[fol. 328] The railroad company being in possession of the property and being personally liable for the taxes which are a lien on the property, the judgment was properly rendered against it as well as the director general who had charge of the property when the assessment should have been made. The railroad company was at all times the holder of the legal title to the property and so was under the statute at all times liable to the State for the taxes. *St. Louis R. Co. vs. Middlekamp*, 256, U. S., 226.

To hold otherwise is to say that the State may after all lose its taxes; for the State can only sue the U. S. Government by its grace. Congress may repeal the act tomorrow and leave the State without remedy, but for its lien on the property and its right to collect from the person in possession when the assessment is made. The statute

was so worded to protect the State, when an assessment was omitted as here, and is made later.

In *Commonwealth vs. L. & N. R. Co.*, 189 Ky., 309, it was held that a railroad company could not be indicted for failure to keep a suitable waiting room under federal control and in *Rogers vs. Hines*, 193 Ky., 795, the same ruling was made as to failure to furnish cars. These cases are in line with the *Ault* case, 256 U. S. 554, but they go no further. Here we have the right of the State of Kentucky to collect its taxes after federal control ceased under an assessment made after it ceased. The property is liable for the taxes, the company in possession must pay them, and it must present the matter in settling its accounts with the director general. The State could not disturb the property while under federal control; but, when federal control ceased, the sovereign state could look to the property and the person in possession for its taxes just as it could if there had never been any federal control of it.

Though these suits have been in court over five years, this objection was first made in the petition for rehearing. It was not made in the briefs in this court. It was not made in the circuit court, and it is earnestly submitted that it is an afterthought and without merit.

[fol. 329] Section 15 of the Federal Control Act provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks and bonds."

The provision of the federal statute that taxes "Shall be paid out of the revenue derived from railway operation while under federal control" in nowise affects the State statute making these taxes a lien on the property and making the owner of the legal title and the claimant in possession, responsible therefor, and is no bar to the enforcement of the State's rights under it, after federal control has ceased. "The revenue derived from the railroad operation while under federal control," was insufficient to meet the charges thereon as provided by the federal statute; but clearly the taxes due the State were not for this reason to remain unpaid. The purpose of the federal statute was only to provide a mode of payment of the taxes. But when the taxes were not paid and federal control ceased, the taxes may be enforced just as they would be, if there had been no federal control. The rule is that a temporary statute expiring by its own limitation leaves the law as it was at its enactment. 25 R. C. L., p. 932.

The Supreme Court in deciding the *Middlekamp* case, 256 U. S. 226, did not rest its decision on the narrow view suggested by appellant. It rested its decision simply on the plain letter of the statute. The argument for appellant is rested alone on the first section of the Act. It ignores altogether the 15th section which

was added to prevent the very interpretation now urged. What else can these words mean and for what other purpose were they inserted?

"That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the state in relation to taxation."

The laws of Kentucky on which the judgment rests are expressly not impaired, repealed, or affected by the act. Their enforcement [fol. 330] now in no way affects the transportation of troops, war material, or government supplies. The Act was never intended to affect state laws except for these purposes. That was the meaning of the Act. To give it any other construction is to ignore its plain language and its clear purpose and intent. All the laws of the state "In relation to taxation" are unaffected by the Act, not as appellant would contend, only the laws of the State and the powers of the State as to certain taxes. This provision of the statute includes property taxes on less than privileges taxes. It was inserted that the states might collect their taxes as before and not to require them to look alone to the Federal Government for them. Otherwise the State Government might be unable to exist, for the State could not enforce payment by the Federal Government. It can only be sued by its consent, and no way was provided for suits against it. The taxes were to be settled like other claims between the corporation and the United States; but the State is not a party to this settlement; it looks to its taxpayers and they settle with the United States. There can be no middle ground. Either the powers of the State "in relation to taxation were affected or were not affected." The 15th section of the Act was added to remove all doubt on the subject. No provision was made for the payment of taxes when the fund in the hands of the director general was exhausted. These taxes are claims arising two years after federal control ceased, and when a large deficit had arisen.

2. As to Penalty

While the twenty per cent is called a penalty in the statute, it is provided that fifteen per cent goes to the officer prosecuting the proceeding for his services and only five per cent goes into the treasury. The same provision is made in the judgment appealed from (record, p. 43). The cost of the collection must be borne either by the State or by the taxpayer. It is only just that he should pay this cost, rather than the other taxpayers of the State. To this extent, the twenty per cent though called a penalty is simply a provision for [fol. 331] costs. The remaining five per cent goes into the treasury and is the only interest the State receives on its delayed taxes. In the Ault case interest at six per cent per annum on the amount found due was allowed against the director general from July 29, 1918, until paid. In this case all the interest charged for a greater delay is five per cent. This is certainly not punishment. It is only compensation for the delay in payment and is less than one

year's interest. In fact the twenty per cent is less than the interest allowed in the Ault case for the delay. To call this punishment is to trifle with words. The penalties held not enforceable in the Ault case are thus there defined.

"But double damages, penalties and forfeitures which do not merely compensate but punish, are not within the purview of the statute."

The twenty per cent here simply compensates the officer for his services and the State for the interest it had had to pay on the State warrants. The fact is the State is not made whole. In the Ault case, Ault got his \$50.00 with legal interests. He was only denied \$390.00 as a penalty in addition to this. The penalty was practically seven times the amount of his claim. That was plainly punishment, but not so is a provision for payment of costs and five per cent. for delay in paying taxes.

"It is the legal duty of every person liable for taxes to pay the same when due, and the power of the State to impose on the taxpayer penalties for noncompliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, cannot be doubted. And if the State is compelled to resort to legal proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case."

26 R. C. L., p. 386, sec. 344.

This objection like the other is first made in the petition for rehearing. It was not made in the briefs in this court or in the circuit court.

To deprive the officer of compensation in these proceedings is to [fol. 332] nullify the statute authorizing such proceedings, for certainly officers will not so act without pay. They are liable for costs if unsuccessful. Plainly the statute does not mean that the State shall be without remedy in this class of cases.

This objection only applies to the director general. Plainly the railroad company is not within the purview of the opinion in the Ault case. That opinion so far as it deals with the question of penalty, only defines the liability of the director general and what is said there had no application to the railroad. As we have shown the twenty per cent. here is not allowed to punish, but for compensation, and it is properly allowed against the director general.

Federal control began on the 27th day of December, 1917, and ended on the 1st day of March, 1920.

This is a mere assessment proceeding. It was proper to make the railroad company and the director general defendants that both might be heard. The judgment properly made the assessment against both. This was for the protection of the company. Their rights as between themselves may be settled when their accounts are settled.

The whole spirit and purpose of the Control Act in relation to

taxation was to provide against any conflict with the existing laws or powers of the State. The State may collect its taxes and the reasonable costs of collection are a part of the tax, so is interest on taxes delayed in payment. The allowance of twenty per cent. in cases like this was provided for by the State laws for this reason. The Federal Control Act in providing that it should not affect, amend, repeal or impair the tax laws of the State necessarily leaves unaffected the taxes and the rights of the State incidental to their non-payment, such as the right to cost and interest for the delay. The Federal Act was aimed at the removal of such things only as interfered with its designated purposes. The taxation of this property was provided for under the laws of the State that then existed and those laws also [fol. 333] provide for the payment of the costs and compensation for the delay. Under no stretch of the imagination can it be contended that taxation of railroad property impeded the movement of troops or material. Therefore we say that the Federal Control Act has no bearing whatever on this case. Especially is this true since the assessment here was made long after Federal Control ceased.

Summing up in conclusion we submit:

1. To sustain the first point and hold that no judgment should go against the railway company is to hold that the State may only look to the Federal Government for its taxes and that it can in no way enforce payment though it has a lien on the property and the railway company has possession of it and holds the title to it.

2. To sustain the second point and hold that the twenty per cent. should not be adjudged is to hold that the cost of the delayed assessment must be borne by the other taxpayers of the State and not by the property taxed, and that no allowance may be made to the State for interest on the taxes the payment of which has been delayed.

Certainly neither of these positions can be maintained, as to the corporation or the director general.

Respectfully, Leslie W. Morris, Hazelrigg & Hazelrigg, Hobson & Hobson, for Appellee.

[fol. 334] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER TO FILE PETITION FOR REHEARING, ETC.—Sept. 16, 1924

Came appellant by Counsel and filed motion that the petition for rehearing or modification of the opinion, and the response thereto, and the reply to such response heretofore filed in the Clerk's office, during vacation, be now noted and filed of record.

[Title omitted]

IN COURT OF APPEALS OF KENTUCKY

ORDER DENYING PETITION FOR REHEARING—Oct. 10, 1924

The Court being sufficiently advised, it is considered, that the appellant's petition for rehearing in each of the foregoing cases, be and the same are hereby overruled.

[fol. 335] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 16, 1924

The plaintiff in error, the Southern Railway Company, assigns the following errors as having been committed herein:

1. The Court erred in rendering any judgment against the plaintiff in error, since it appears in the proceedings herein that during the several years for which retroactive assessments were made the property of the plaintiff in error was in charge of the Director General, and such judgment was contrary to the proclamation of the President and the acts of Congress relating to Federal control of railroads.

2. The Court erred in holding that the Southern Railway Company in Kentucky was in fact and in law the same as the Southern [fols. 336 & 337] Railway Company.

3. The Court erred in holding that there was any such connection between the lines of the Southern Railway Company in Kentucky and the lines of the Southern Railway Company south of Danville, Kentucky as justified the assessment of a franchise tax against the Southern Railway Company based upon the earnings of its system south of Danville, Kentucky, and in so holding there was imposed in effect a tax against the Southern Railway Company on account of property owned by it outside of the state of Kentucky, such imposition being in violation of the Fourteenth Amendment of the Constitution of the United States.

4. The Court erred in holding that a penalty should be adjudged against the Southern Railway Company for failure to assess its property during the years in controversy, whereas said property was at the time in the control of the Director General and there was no obligation upon it under the proclamation of the President and the acts of Congress relating to Federal control of railroads to make any return for assessment during those years.

5. The Court otherwise erred in its judgment herein.

October 16, 1924.

(Signed) D. E. Jeffries, C. W. Milner, Alex. P. Humphrey,
for Plaintiff in Error.

[File endorsement omitted.]

[File endorsement omitted]

[fol. 338]

IN COURT OF APPEALS OF KENTUCKY

WRIT OF ERROR—Filed October 16, 1924

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said Court of Appeals of Kentucky before you in a suit between Commonwealth of Kentucky, by &c., and Southern Railway Company, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such their validity; a manifest error has happened to the great damage of the said Southern Railway Company, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of November, 1924, in the said Supreme Court to be then and there held that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 16th day of October, the year of our Lord Nineteen Hundred and Twenty-four.

J. W. Menzies, Clerk of the District Court, East. Dist. Ky.
by Lillian M. Wiard, D. C. (U. S. District Court, East
Dist. Ky., U. S. America.)

Allowed by F. D. Sampson, Chief Justice of Court of Appeals of Kentucky.

[fols. 339-341] BOND ON WRIT OF ERROR FOR \$25,000—Approved and filed October 16, 1924; omitted in printing

[fol. 342] CITATION—In usual form, showing service on J. P. Hobson; filed October 16, 1924; omitted in printing

[fol. 343] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS OF JAMES C. DAVIS—Filed October 16, 1924

The plaintiff in error, James C. Davis, Director General, assigns the following errors as having been committed herein:

1. The Court erred in holding that the properties of the Southern Railway Company south of Danville, Kentucky, had such connection with the properties of the Southern Railway Company in Kentucky as to justify an assessment in Kentucky of the franchise of the Southern Railway Company at all or as measured by the earnings [fol. 344] upon its lines south of Danville, Ky.

2. The Court erred in holding that the properties of the Southern Railway Company in Kentucky are to be regarded as the property of the Southern Railway Company.

3. The Court erred in assessing a penalty against the plaintiff in error on account of taxes found due from him during any of the years in controversy, the assessment of such penalties being a violation of the proclamation of the President and the acts of Congress and the lawful orders of the Director General relative to Federal control of the Railroads.

4. The Court erred in holding that for the purpose of taxation by the Commonwealth of Kentucky of the franchises of the Southern Railway Company there should be taken into consideration the earnings of the Southern Railway Company over its system south of Danville, Kentucky.

5. The Court erred in holding that there was any such connection between the properties of the Southern Railway Company in Kentucky and the properties of the Southern Railway Company south of [fol. 345] Chattanooga, Tennessee, by reason of assumed connection of the properties of the Southern Railway Company in Kentucky at Danville, Kentucky, and the properties of the Southern Railway Company at Chattanooga, Tennessee, through the properties of the Cincinnati, New Orleans & Texas Pacific Railway Company extending from Danville, Kentucky, to Chattanooga, Tennessee, as justified the assessment of a franchise tax against the Southern Railway Com

pany based upon the earnings of its system south of Danville, Kentucky, and in so holding there was imposed in effect a tax against the Southern Railway Company on account of property owned by it outside of the State of Kentucky, such imposition being in violation of the Fourteenth Amendment of the Constitution of the United States.

6. The Court erred in approving an assessment of the franchises of the Southern Railway Company by taking into consideration the earning of its property south of Chattanooga, Tennessee, because to [fol. 346] do so was to make an assessment in Kentucky of property outside of the State of Kentucky, and in so doing there was a violation of the Fourteenth Amendment of the Constitution of the United States.

7. The Court otherwise erred in its judgment herein.

L. E. Jeffries, C. W. Milner, Alex. P. Humphrey, Attorneys-
for Plaintiff in Error.

[File endorsement omitted.]

[fol. 347]

[File endorsement omitted]

IN COURT OF APPEALS OF KENTUCKY

WRIT OF ERROR—Filed Oct. 16, 1924

The President of the United States of America to the Honorable the
Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said Court of Appeals of Kentucky before you in a suit between Commonwealth of Kentucky, by &c., and James C. Davis, Director General, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such their validity; a manifest error has happened to the great damage of the said James C. Davis, Director General, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of November, 1924, in the said Supreme Court to be then and there held that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 16th day of October, the year of our Lord Nineteen Hundred and Twenty-four.

J. W. Menzies, Clerk of the District Court, East. Dist. Ky.,
by Lillian M. Ward, D. C. (Seal U. S. District Court, East.
Dist. Ky., U. S. of America.)

Allowed by F. D. Sampson, Chief Justice of Court of Appeals of Kentucky.

[fol. 348] IN COURT OF APPEALS OF KENTUCKY

EXHIBIT IN EVIDENCE—Filed Oct. 16, 1924

United States Railroad Administration, Washington, January 11,
1919

General Order No. 50-A

General Order No. 50, issued October 28, 1918, is hereby amended to read as follows:

It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier [fol. 349] company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of the General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way a service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such action at law suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and [fols. 350 & 351] dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be

required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process or otherwise in respect of any such cause of action or proceeding.

Walker D. Hines, Director General of Railroads.

254 Fed. 880; 255 Fed. 795; 174 N. Y. Supp. 536.

[File endorsement omitted.]

[fol. 352] CITATION—In usual form, showing service on J. P. Hobson; filed Oct. 16, 1924; omitted in printing

[fol. 353] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 5, 1924

For the purpose of an appeal to the United States Supreme Court, the Clerk of the Court of Appeals of Kentucky will please copy:

1. The entire record of the first appeal, including exhibits B files with answer, except that the following pages only will be copied from the printed stockholders' reports:

1914—pages 17, 67, 69.

1915—pages 15, 68, 69.

1916—pages 55, 56.

1917—pages 57, 53.

1918—pages 19, 21.

2. The entire record on second appeal.

3. Petition for rehearing.

4. Opinions of the Court (2).

[fol. 354] Humphrey, Crawford & Middleton, Attorneys for Appellants. Hobson & Hobson, Attorneys for Appellees.

[File endorsement omitted.]

IN COURT OF APPEALS OF KENTUCKY

RETURN TO WRIT OF ERROR

In obedience to the commands of the attached Writs of Error, I hereby transmit to the Supreme Court of the United States a complete transcript of the record called for in the Schedule, with all things touching the same, as appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, on this the 11th day of November, 1924.

Jno. A. Goodman, Clerk Court of Appeals of Kentucky.
(Seal Court of Appeals, Kentucky.)

Fee for transcript, \$133.50.

Endorsed on cover: File Nos. 30,723, 30,724. Kentucky Court of Appeals. Term No. 758. Southern Railway Company, plaintiffs in error, vs. Commonwealth of Kentucky, by, &c. Term No. 759. James C. Davis, Director General, plaintiff in error, vs. Commonwealth of Kentucky, by, &c. Filed December 3rd, 1924. File Nos. 30,723, 30,724.

(6528)

STIPULATION AND ADDITION TO RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 218

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, ETC.

No. 219

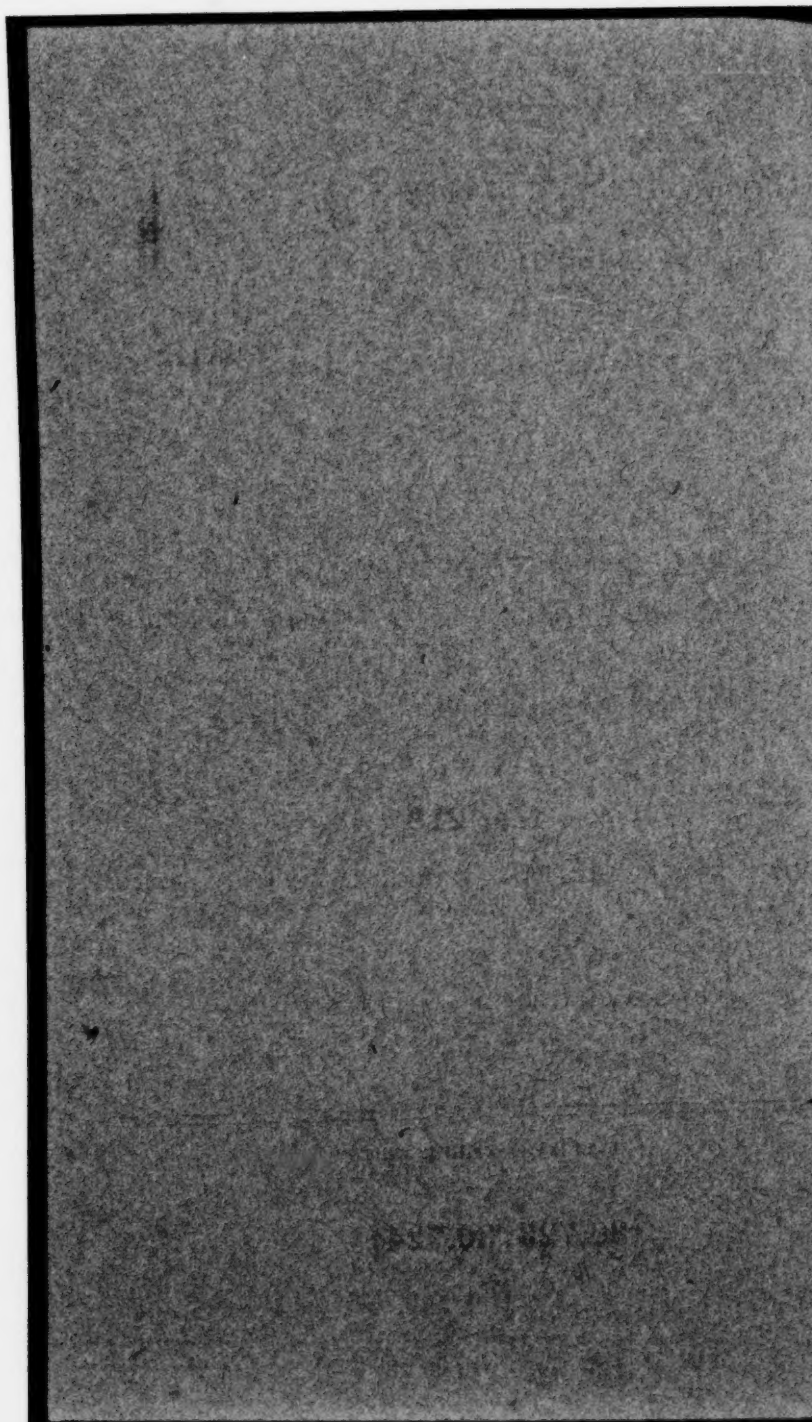
**JAMES C. DAVIS, DIRECTOR GENERAL, ETC., PLAINTIFF
IN ERROR,**

vs.

COMMONWEALTH OF KENTUCKY, ETC.

FILED DECEMBER 2, 1935

(30,723, 30,724)



SUPREME COURT OF THE UNITED STATES

No. 758

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

v.

COMMONWEALTH OF KENTUCKY, by, &c., Defendant in Error

No. 759

DAVIS, Director General, Plaintiff in Error,

v.

COMMONWEALTH OF KENTUCKY, by, &c., Defendant in Error

STIPULATION

The maps attached to the stockholders' reports for 1917 and 1918, which were part of the record before the court of appeals of Kentucky, having been omitted from the transcript in this court by mistake, it is stipulated that the maps hereto attached are printed copies of these maps and may be made part of the transcript in this court to make the record complete and it is agreed that the maps for 1917 and 1918 were substantially the same.

Alex. Pope Humphrey, Chas. W. Milner, Attys. for Plaintiff in Error. J. P. Hobson, Atty. for Defendant in Error.

[Endorsed:] File Nos. 30,723, etc. Supreme Court U. S., October Term, 1925. Term Nos. 218 & 219. Southern Ry. Co., P. E., vs. Commonwealth of Kentucky, etc. James C. Davis, Director General, etc., P. E., vs. Commonwealth of Kentucky, etc. Stipulation and addition to the record. Filed Dec. 3, 1925.

MAPS

TOO

LARGE

FOR

FILMING



(4)

DEC 3 1924

W.H. R. STANBURY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

Nos. 100 and 101.

218 219

JAMES C. DAVIS, Director General, as Agent, - Petitioner,

vs.

COMMONWEALTH OF KENTUCKY, BY &c., - Respondent.

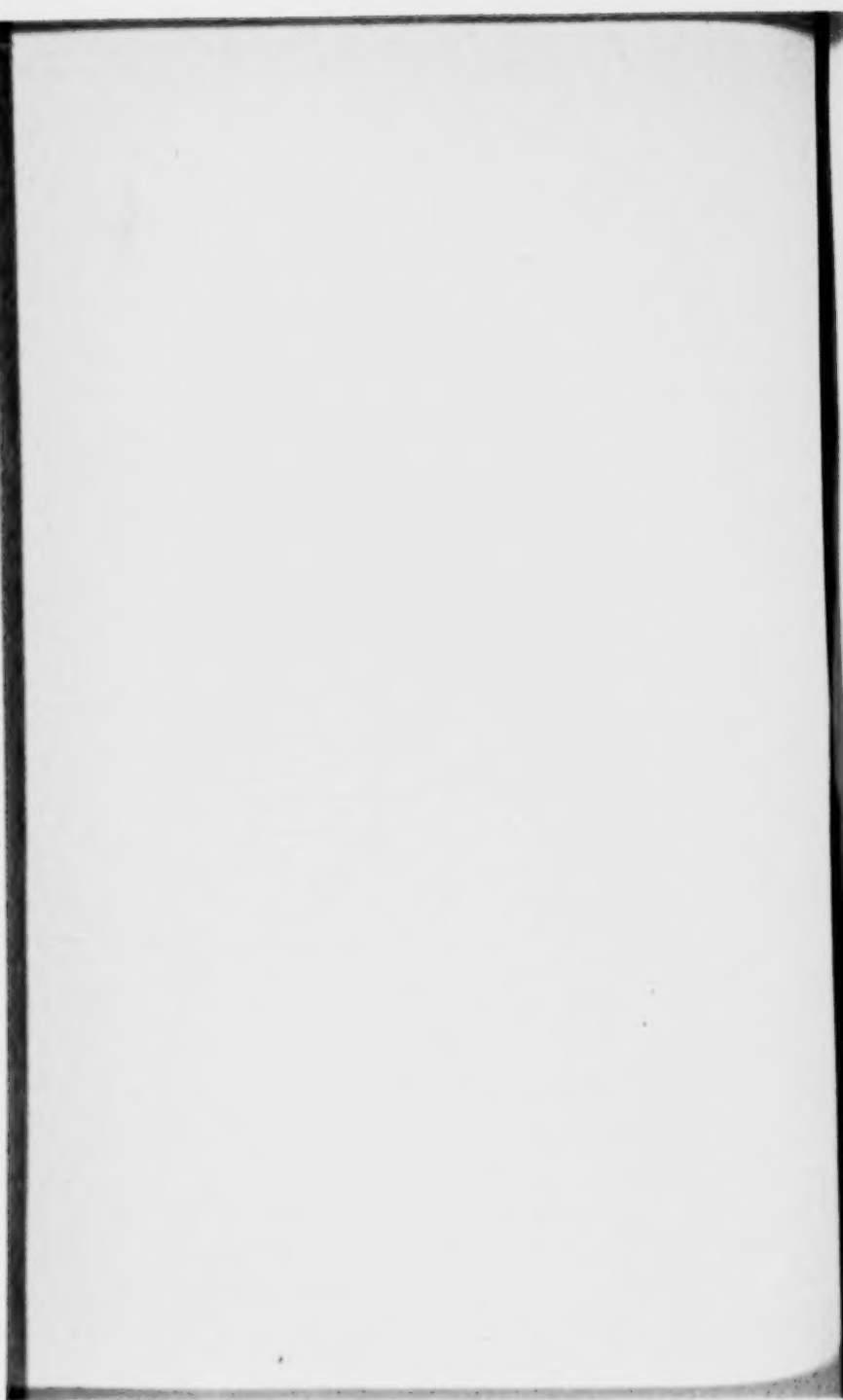
SOUTHERN RAILWAY COMPANY, - - - Petitioner,

vs.

COMMONWEALTH OF KENTUCKY, BY &c., - Respondent.

PETITION FOR CERTIORARI.

L. E. JEFFRIES,
ALEX P. HUMPHREY,
CHARLES W. MILNER,
Attorneys for Petitioners.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

JAMES C. DAVIS, DIRECTOR GENERAL,
AS AGENT, - - - - - *Plaintiff-in-Error,*
vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - - *Defendant-in-Error.*

SOUTHERN RAILWAY COMPANY, - *Plaintiff-in-Error,*
vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - - *Defendant-in-Error.*

PETITION FOR CERTIORARI.

While these two cases stand, for reasons which will be hereafter given, on separate writs of error, yet they are so intimately associated that we are asking a certiorari on behalf of each of the plaintiffs-in-error in one petition rather than encumber the record with two petitions. We will endeavor to state the cases as concisely as possible.

The taxing laws of the State of Kentucky as applied to railroads are quite complicated as can be seen by reading the thorough exposition of them in the

case of *Louisville & Nashville Railroad Company v. Greene, Auditor*, and *Greene, Auditor, v. Louisville & Nashville Railroad Company*, 244 U. S. 522. We think it is sufficient to say that this system consists in valuing the physical property of the railroad and, in order to determine the value of its intangible property, capitalizing the earnings of all lines operated, leased or controlled by it at a certain rate of interest, and assuming that this is the totality of value—tangible and intangible—of the property of the railroad, assigning to Kentucky such a proportion of this total value as the mileage in Kentucky bears to the total mileage, deducting from the sum thus found the value of the tangible property in Kentucky, and calling this remainder the value of the franchise.

In the case at bar a proceeding was taken against the Southern Railway Company, a Virginia corporation, in the appropriate court in Kentucky. It was alleged that a railroad, incorporated as the Southern Railway Company in Kentucky (a Kentucky corporation), was in fact owned, operated and controlled by the Virginia corporation. In other words, that the Southern Railway Company in Kentucky was but a name to designate a property in Kentucky belonging to the Southern Railway Company. It was insisted, therefore, that although the property—tangible and intangible—of the Southern Railway Company in Kentucky had been reported for taxation for the years 1915, 1916 and 1917, and duly assessed, yet, that in fact an assessment should have been made against

the Southern Railway Company, the Virginia corporation; and that if the earnings of the Virginia corporation had been capitalized and the arithmetical problem worked out as above set out there should have been a considerable franchise assessment against the Southern Railway Company, the Virginia corporation.

A second suit was brought against the Southern Railway Company and the Director General for the taxing years 1918 and 1919, wherein similar allegations were made, the two cases being differentiated, among others, by the fact that during these two years the Director General was in charge of all the properties of the Southern Railway Company.

Certain defenses were made to both of these suits. It was insisted that the Southern Railway Company in Kentucky was not an alias for the Southern Railway Company and, further, that it had no physical connection with the Southern Railway System south of Danville, except through the Cincinnati, New Orleans & Texas Pacific Railway Company, which the Southern Railway Company did not control. It was further insisted that this manner of assessment was for the purpose and would have the effect of bringing into Kentucky property which had no situs in Kentucky and, therefore, any assessment based upon the theory of the Commonwealth would be violative of the Fourteenth Amendment in that it would be a taxation by Kentucky of property having no situs in Kentucky. The same objection was made to the other

suit and, in addition thereto, it was pleaded that during these two taxing years the property was in the hands of the Director General and that there was no obligation on the part of the Southern Railway Company to make a report, and that no taxes could be levied against it for those two years, and again that, for the reasons given in the other case, no taxes could be levied as against the Director General.

There was this difference between the two cases. Prior to January 1, 1917, the Southern Railway Company did not own nor control a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. Subsequent to January 1, 1917, the Southern Railway Company did control a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company—that is to say, a certain company called the Southwestern Construction Company owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. A certain portion of the stock in the Southwestern Construction Company was owned by the Southern Railway Company; another portion was owned by the Alabama Great Southern Railroad Company, and the Southern Railway Company owned the majority of the voting stock in the Alabama Great Southern Railroad Company. It will thus be seen that through its ownership of the stock of the Alabama Great Southern the Southern Railway Company controlled the voting power of the stock of the Southwestern Construction Company

owned by the Alabama Great Southern, and adding that to its own ownership in the Southwestern Construction Company, it did control a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. From this statement it must not be inferred that the Southern Railway Company owned even a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway. This is so plain an arithmetical proposition that we do not think it worth while to figure it out.

The court of first instance dismissed both of these cases. The first appellate tribunal affirmed this judgment. The Court of Appeals of Kentucky, however, reversed both cases. Its opinion may be found in *Commonwealth of Kentucky v. Southern Railway Company*, 193 Ky. 474. The case was remanded to the court below, directing assessments to be made in both cases. Accordingly, the lower court did make assessments in both cases, and there was another appeal. The opinion on this is reported in *Southern Railway Company v. Commonwealth of Kentucky*, 204 Ky. 388.

The Court of Appeals made a distinction between the two cases in this: As to the case involving assessments for 1915, 1916 and 1917, where the suit was against the Southern Railway Company only, it held that as the only connection between the Southern Railway Company lines south and the Kentucky, Indiana and Illinois lines of the Southern Railway west was by the Cincinnati, New Orleans & Texas Pacific

Railway Company from Danville to Chattanooga, that as the Southern Railway Company did not control the Cincinnati, New Orleans & Texas Pacific Railway, that line could not be used to unitize the Southern Railway System south of Danville with the system north and west of Danville. The records show that, taking into consideration alone the earnings from Danville west, the assessment already made on the Kentucky property was equal or more than equal to any assessment that could be made by bringing in the earnings of this line and, therefore, the court reversed the judgment of the lower court as to assessments for the years 1915, 1916 and 1917. It, however, found that as during the years 1917 and 1918 the Southern Railway Company controlled the majority of voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company, this control supplied the nexus between Danville, where the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway Company join, and Chattanooga, where the Cincinnati, New Orleans & Texas Pacific Railway unites with the Southern Railway System.

We have taken separate writs of error for the Southern Railway and the Director General because in the judgment finally entered there have been imposed, not only the taxes growing out of this new assessment, but also a penalty of twenty per cent. In the writ of error taken out for the Director General we are insisting that these penalties are unlawful. In other words, that the United States cannot be

made subject to penalties. Of course, this is a matter in which the Southern Railway Company is not concerned.

The Southern Railway Company is assigning for error that, assuming that it was lawful to make any assessment, it should have been made against the Director General during this period which was one of Federal control.

Both, however, insist upon the constitutional question, *i. e.*, that the State of Kentucky cannot under the facts of this case construct a unit by which it will bring into the taxing authority of the State of Kentucky values based on earnings made in other States. We are insisting that this is an extension of the "unitary" system that is not consonant with the Constitution of the United States, nor with the opinions of this court as applying this unification doctrine. The court will, of course, have in mind the distinctions that have been made between insisting that a law of a State is unconstitutional and insisting that there has been an unconstitutional application of a constitutional law. Here, the taxing laws of Kentucky are not insisted upon as being unconstitutional, but that the application is unconstitutional. However, the writ of error was justified by the fact that there is involved here an application of the Act dealing with the operation of railroads under Federal control, the proper method of assessment under such circumstances and the question whether, in any event, any penalty can be assessed. Although the Court of

Appeals of Kentucky did not expressly pass upon these Federal questions, yet they were not only made by the defendants, but issue was joined upon them (if it is necessary to join issue upon a question of law). Thus, defendants pleaded that the effort made here is simply for the purpose of endeavoring to bring into the State of Kentucky, for the purpose of taxation, property not in Kentucky, and value appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky, and the Constitution of the United States, particularly the Fourteenth Amendment thereto.

Again, the defendants made the following answer:

“The defendants, Southern Railway Company and John Barton Payne, Director General of Railroads, acting as Agent under Section 206 of the Transportation Act of 1920, answering the statement filed herein, state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated, for the whole of the years 1918 and 1919, all of the railroads and railroad property owned, operated, leased or controlled by the Southern Railway Company.

“The defendants deny that it was the duty of these defendants or of either of them, for the taxing year mentioned in the first paragraph of the statement, viz., 1918, to file any report to the Auditor of Public Accounts, of any kind, or of the kind mentioned in the Statement, except insofar as it was the duty of the Director General to file the reports for the four railroads named

in the Statement as having lines in Kentucky, and for railroads in no way involved herein."

This was repeated as to the year 1919.

In the Reply filed by the Commonwealth this was said:

"Comes the plaintiff, Commonwealth of Kentucky, by Robert Hawkins, Sheriff of Woodford County, and for its reply to Paragraphs one and two of the answer of defendant says that this action did not, does not, and will not hereafter affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds. Plaintiff says that no act or authority of the defendant, Director General, or his operation of the railroads of the United States may amend or repeal or impair or affect the right of plaintiff to collect or to proceed to collect the taxes alleged to be due in its original statement herein; according to the Act of Congress in such cases made and provided."

And in the close of that same reply we find the following:

"Plaintiff denies that this action is an effort to bring into Kentucky for the purpose of taxation, property not in Kentucky, or value or values appertaining to property not in Kentucky or earnings derived from property not in Kentucky; denies this action is in violation of the Constitution of Kentucky or of the United States; denies that a judgment for plaintiff herein is in violation of the Constitution of Kentucky or the United States."

In the opinion of the Court of Appeals in *Commonwealth v. Southern Railway Company, etc.*, 193

Ky. 474, the court in effect held that as the Southern Railway owned and operated the line of the Southern Railway Company in Kentucky there was no violation of the Fourteenth Amendment in bringing into the estimate of franchise value in Kentucky lines of roads controlled by the Southern Railway Company. The court entirely ignored so much of the answer of the Director General and the Southern Railway as set forth the fact that during the years 1918 and 1919 all the properties of the Southern Railway Company were in the hands of the Director General, and that any assessment should be governed by the Act of Congress dealing with that matter. In doing so, according to the laws of the State of Kentucky, the court had to be considered as passing adversely upon any such question. The following is a statement of the doctrine of the law of the case:

Goff v. Lowe, 141 Ky. 799: "When a case is brought here the opinion is conclusive of all questions either decided in the opinion or presented by the record and passed unnoticed in the opinion; for what the court passes unnoticed must be deemed to be approved. Were the rule otherwise litigation would be interminable, and reversals in cases of this sort, might be made without number, first upon one ground and then upon another. Such a practice would encourage parties to present only some of the errors on one appeal, and hold back the others for service at a future time. The opinion on an appeal is the law of the case, and is conclusive of all matters then before the court."

Again, the Court of Appeals of Kentucky has decided, and this court has cited its decision, as to what is meant by controlled roads. We quote now from *L. & N. R. R. Co. v. Greene*, 244 U. S. 549:

“In *Commonwealth v. L. & N. R. R. Co.*, 149 Kentucky, 829, 838, the very point was considered by the Court of Appeals, which declared: ‘If the railroad company owns a majority of the stock of any company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the Auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing the value of the franchise of the controlling company in the State of Kentucky.’ ”

When the two cases, therefore—one case for the years 1915, 1916 and 1917, against the Southern Railway Company alone, and the other case for the years 1918 and 1919, against the Southern Railway Company and the Director General—were determined by the lower court, under the directions of the opinion of the Court of Appeals, the court made an assessment for each of the periods. But when the case came back to the Court of Appeals and was decided in *Southern Railway, etc., v. Commonwealth of Kentucky*, 204 Ky. 388, the court held that as during the years 1915, 1916 and 1917 the Southern Railway Company did not control the Cincinnati, New Orleans & Texas Pacific Railway, it was not competent for the

State of Kentucky to bring into the valuation of the franchise the earnings of the system in the southern States, but that as during the years 1918 and 1919 the Southern Railway Company did control a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific, this supplied a nexus so that the earnings of the Southern Railway Company in the South could be brought into the calculation of the franchise.

In the opinion of the Court of Appeals—*Commonwealth of Kentucky v. Southern Railway Company*, 193 Ky. 474—will be found a very full statement of the relations between the Southern Railway Company and the Southern Railway Company in Kentucky. In regard, however, to the relations between the Southern Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company, this is not discussed, the matter resting simply upon the fact that the Southern Railway Company controlled a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. It would make this statement too long to give all that is set out in the answers to interrogatories and in the stipulations in reference to what this "control" is. It suffices to say that it appears that a number of the executive officers of the Southern Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company are the same. There is nothing, however, to show that the board of directors of the two companies is the same, nor that the Cincinnati,

New Orleans & Texas Pacific Railway Company does not receive and disburse all of its own earnings, and does not make its own tariffs and collect and apply to its own corporate purposes all of its earnings of every character. There is nothing to show that the treasurer of the two companies—Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company—is the same, nor that the earnings of the Cincinnati, New Orleans & Texas Pacific Railway Company go into the treasury of the Southern Railway Company.

The record shows that the Director General, for the years 1918 and 1919, made due return to the taxing authorities of the State of tangible and intangible property of the Cincinnati, New Orleans & Texas Pacific Railway Company, and that these taxes were paid. It is only fair, however, to add that, in making the assessment in the instant case, the amount so paid by the Cincinnati, New Orleans & Texas Pacific Railway Company was deducted from the amount found due by the Southern Railway Company.

In order to again bring to the attention of the court the fact that it was making an assessment against the Southern Railway Company as well as the Director General for the years 1918 and 1919, and was assessing a penalty, a petition for rehearing was put in, pointing out these two matters. The court, however, overruled this petition for rehearing, evidently under the idea that the whole matter had been con-

cluded by the first opinion and had become the law of the case.

We do not suppose it is desirable to go into the facts in regard to the ownership or operation by the Southern Railway Company, the Virginia corporation, of the Southern Railway Company in Kentucky, the Kentucky corporation, nor to go into the question of the control by the Southern Railway of the Cincinnati, New Orleans & Texas Pacific Railway. The court will find the facts of this case set out in the record in very brief compass. They are disclosed in answers to interrogatories and in stipulations. At last what the court will have to do, if it takes jurisdiction of this case, is to determine :

1. Whether the Southern Railway Company, the Virginia corporation, is so in the ownership and operation of the property of the Southern Railway Company in Kentucky, the Kentucky corporation, as to entitle the State of Kentucky to assess a franchise tax against the Southern Railway Company, the Virginia corporation, by bringing into the calculation of such franchise tax the earnings of all of its lines.

2. Let it be conceded that the Virginia corporation, the Southern Railway Company, owned and operated the property of the Southern Railway Company in Kentucky, the Kentucky corporation. Let it be conceded that in this way the Southern Railway Company, the Virginia corporation, was the owner and operator of a line of railroad in Kentucky. Let it be conceded that the Southern Railway Company,

the Virginia corporation, owned a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company. Did this control by the Southern Railway Company of the Cincinnati, New Orleans & Texas Pacific Railway Company unify the property of the Southern Railway Company, the Virginia corporation, in Kentucky and its other properties in the southern States? In other words, did the fact of control of a majority of the voting stock of the Cincinnati, New Orleans & Texas Pacific Railway Company supply a nexus between the lines of the Southern Railway Company, the Virginia corporation, in the State of Kentucky, and its lines leading out of and into Chattanooga, just as if the Southern Railway Company, the Virginia corporation, owned the property of the Cincinnati, New Orleans & Texas Pacific Railway Company, and thereby there was created a physical union of the property of the Southern Railway Company, the Virginia corporation, in Kentucky and its properties south of Chattanooga, Tenn.?

3. Under the Federal law governing the operation of railroads by Federal control was it competent for the State of Kentucky to assess any franchise tax against the Southern Railway Company during Federal control?

4. If it was competent for the State of Kentucky to assess a franchise tax against the Director General during Federal control, was it competent for the State of Kentucky to add to the amount of taxes a penalty

of 20%? That this twenty per cent is a penalty appears, we think, from the language of Section 4241 of Kentucky Statutes:

“All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof.”

In the case of *Bank of Kentucky v. Commonwealth*, 107 S. W. 812, 32 K. L. R. 1087, the Court of Appeals has held, we think, distinctly that this twenty per cent is a penalty.

We respectfully request, therefore, that the court will grant us a certiorari both on behalf of the Director General acting as Agent and on the part of the Southern Railway Company.

Respectfully submitted,

L. E. JEFFRIES,

ALEX P. HUMPHREY,

CHARLES W. MILNER,

Attorneys for Plaintiffs-in-Error.

FEB 20 1926

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1924.

Nos. **754 & 759.** 218 & 219

JAMES C. DAVIS, Director General,
as Agent, - - - - - Plaintiff-in-Error,

vs.

COMMONWEALTH OF KENTUCKY,
By, &c., - - - - - Defendant-in-Error.

SOUTHERN RAILWAY COMPANY, - Plaintiff-in-Error,

vs.

COMMONWEALTH OF KENTUCKY,
By, &c., - - - - - Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

L. E. JEFFRIES,
ALEX P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Counsel for Plaintiffs-in-Error



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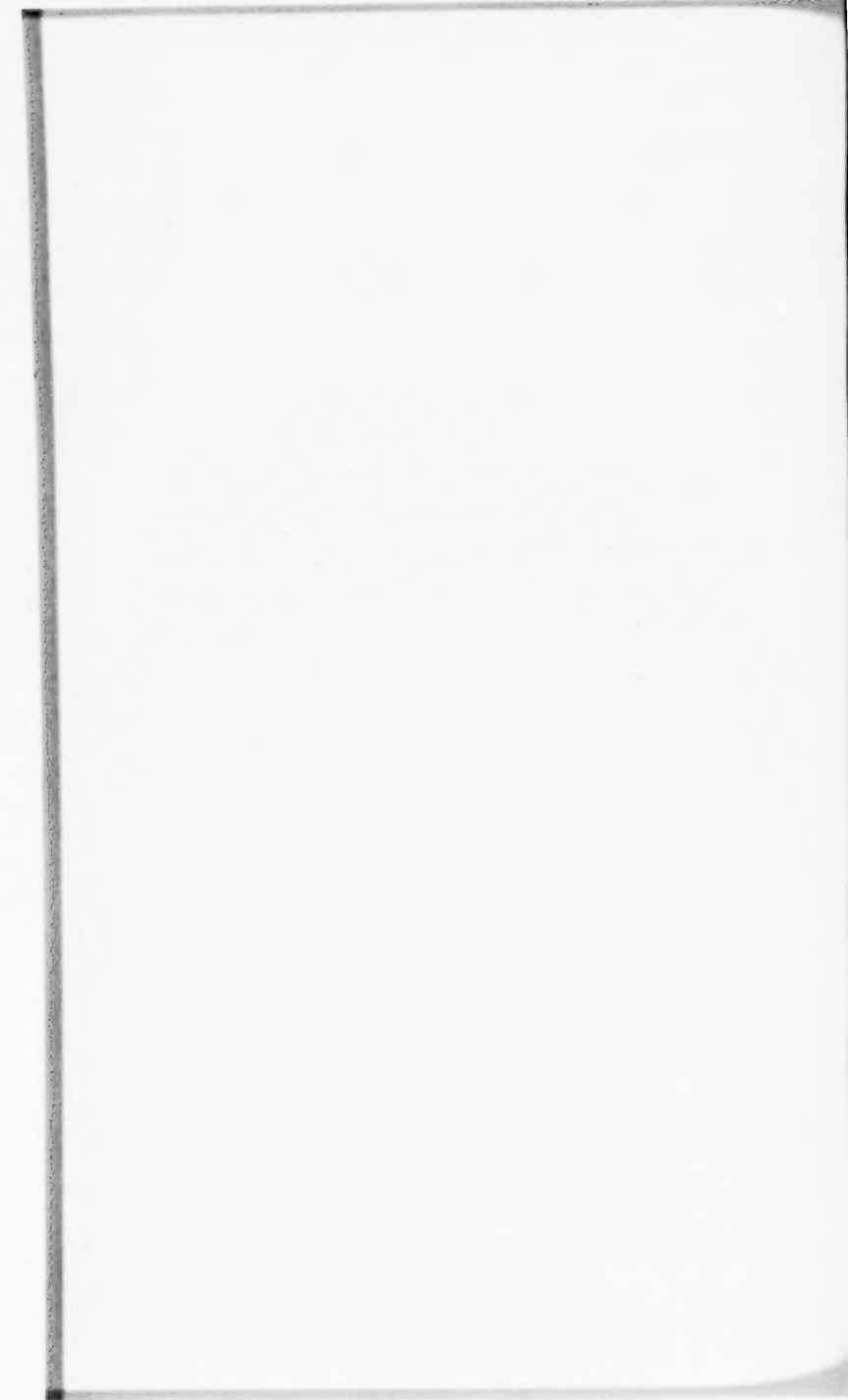
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Southern Ry. Co. v. Commonwealth of Ky., 204 Ky. 388.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Nos. 758 & 759.

JAMES C. DAVIS, DIRECTOR GENERAL,
AS AGENT, - - - - *Plaintiff-in-Error,*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - *Defendant-in-Error.*

SOUTHERN RAILWAY COMPANY, - *Plaintiff-in-Error,*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - *Defendant-in-Error.*

BRIEF FOR PLAINTIFFS-IN-ERROR.

This case is here on writs of error and petitions for *certiorari* to the Court of Appeals of Kentucky, prosecuted by the Southern Railway Company and the Director General, respectively, before the recent general amendments to the Federal Judicial Code became effective. We maintain that under Section 237 of the Judicial Code, as it existed prior to February 13, 1925, and under the case of *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, writ of error will lie, but out of abundant caution application for *certiorari* has been made.

Jurisdiction is based on the following:

1. The State Court assessed a franchise tax against the plaintiffs-in-error, Southern Railway Company and the Director General of Railroads. It is insisted that such assessment was based on property, values appertaining to property and earnings derived from property, wholly outside of the State of Kentucky and is therefore violative of the due process clause of the Fourteenth Amendment to the Constitution.

Fargo v. Hart, 193 U. S. 490.

Delaware, Lackawanna & Western R. R. v. Pennsylvania, 198 U. S. 341.

Wallace v. Hines, 253 U. S. 66.

Union Tank Line v. Wright, 249 U. S. 275.

2. During the years involved the railroads were in the possession of and being operated by the United States Railroad Administration. Under the Federal Statutes applicable to this taking and operation of railroad properties by the United States Railroad Administration no judgment could be rendered against the railroad corporation for the taxes, even assuming that the taxes were constitutionally assessed.

40 Stat. at Large, 457, U. S. Comp. Stat., 1919, Supp. 758.

Missouri Pacific R. R. v. Ault, 256 U. S. 554.

Norfolk Southern R. R. Co., v. Owens, 256 U. S. 565.

3. In addition to the taxes, the State Court assessed a twenty per cent (20%) penalty against the

Director General of Railroads. Such penalty is in contravention of the Federal Statutes regarding the taking over of the railroads by the Government.

Missouri Pacific R. R. v. Ault, 256 U. S. 554.

Norfolk Southern R. R. Co., v. Owens, 256 U. S. 565.

4. The State Court erred in holding that the Southern Railway Company in Kentucky was in fact and in law the same as the Southern Railway Company of Virginia, and in using such holding as the basis for taxing property of the Virginia corporation wholly outside of the State of Kentucky. Such tax being in violation of the due process clause of the Fourteenth Amendment to the Constitution.

Fargo v. Hart, 193 U. S. 490.

Delaware, Lackawanna & Western R. R. v. Pennsylvania, 198 U. S. 341.

Wallace v. Hines, 253 U. S. 66.

Union Tank Line v. Wright, 249 U. S. 275.

The four above points are the only questions presented, and are all of the assigned errors.

The judgment of the Kentucky Court of Appeals was rendered June 13, 1924 (R. 154). It affirmed the Circuit Court's judgment for the years 1918 and 1919 (R. 146). Petition for rehearing was overruled October 10, 1924 (R. 176).

STATEMENT.

The Kentucky franchise tax is not an excise or license tax, but is solely a property tax—i. e., a tax on the intangible property of the corporation based on the net earnings of the corporation. **Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499.**

To avoid confusion, we explain at the outset that there are two railroad corporations involved with somewhat similar names.

The plaintiff-in-error, "Southern Railway Company," was incorporated under the laws of the State of Virginia on February 20, 1894. Its line of railroad is in excess of nine thousand (9,000) miles and extends from Washington, D. C., south, into and through the States of Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama and Mississippi (R. 81). It also had a line from New Albany, Indiana, to East St. Louis, Illinois. It nowhere touches the State of Kentucky.

It owned in States wholly outside of Kentucky valuable excess tangible property, to wit, terminals, shops and double tracks ranging in value for the years involved from Forty-three Million to exceeding Eighty Million Dollars (R. 138).

Its net income and that of its owned, operated, leased or controlled lines wholly outside of the State of Kentucky for the years involved varied from Fifteen Million to Thirty-two Million Dollars per annum (R. 39, 81).

The other railroad corporation involved is the "Southern Railway Company in Kentucky." It was first incorporated in 1868 by the State of Kentucky as the "Louisville, Harrodsburg & Virginia Railroad Company." In 1884 its charter was amended and the name changed to "Louisville-Southern Railroad Company." The property was foreclosed in the Federal Court and sold on August 16, 1894, and on August 17, 1894, the "Southern Railway Company in Kentucky" was incorporated in Kentucky to take over this property (R. 36, 37).

This line of railroad was and is only one hundred twenty-seven (127) miles in length and situated wholly within the State of Kentucky. It extends from Louisville to Lawrenceburg, with branches to Georgetown, Lexington, Burgin and Danville. At each of these latter places it connects with the line of the C. N. O. & T. P. Railway Company from Cincinnati south to Chattanooga. At each of these points the terminal facilities used are the property of the C. N. O. & T. P. Railway Company. At Louisville it used the passenger depot of the I. C. Railroad Company, and the shops, roundhouses and freight yards of the Kentucky & Indiana Terminal Railroad Company. It had no double tracks, no shops, and the only terminal facilities were the inexpensive ones in the small towns along the above route (R. 36, 37, 38, 78, 80).

The "Southern Railway Company in Kentucky" was never a money maker. In only one of the five years involved did it show any profit, to wit, \$112,-

000.00 in 1917. Its net losses for the other years ranged from Twelve Thousand to Six Hundred Thousand Dollars per year.

These two corporations will be hereinafter referred to as the "Southern Railway Company of Virginia" (plaintiff-in-error), and the "Southern Railway Company in Kentucky."

Suit was filed by the Commonwealth of Kentucky in the Woodford County Court against the Southern Railway Company of Virginia to recover the alleged omitted value of its franchise tax for the years 1915, 1916 and 1917. A similar suit was filed against the Southern Railway Company of Virginia and the Director General of Railroads for a similar tax for the years 1918 and 1919. Separate suits were necessary because during the latter two years the United States Railroad Administration had control of and was operating the railroad properties. The suits were identical except for the difference in names and dates.

The claim of the Commonwealth was that because the Southern Railway Company of Virginia owned substantially all of the capital stock of four railroads which did operate in Kentucky, to wit: The Southern Railway Company in Kentucky, the Cumberland Railroad, the Cumberland Railway, and the Mobile & Ohio Railroad Company; that these latter companies were in law and in fact the same as the Southern Railway Company of Virginia; that that com-

pany was therefore operating in Kentucky as a common carrier and liable to the State of Kentucky for taxation on account of the property owned and business transacted by the four above companies. It was conceded that the tangible property in Kentucky had already been assessed and taxes paid by these four companies. It was further conceded that each of the four railroad companies operating in Kentucky had paid their respective franchise taxes. The claim was that the franchise of the Southern Railway Company of Virginia had never been paid or assessed except *pro tanto* by the above payments. The relief sought was that “* * * the omitted portion of the franchise of the defendant as hereinbefore set out be assessed.”

The answers contained the necessary denials and affirmatively pleaded the constitutional question:

“* * * that if the Court should be of opinion, under all the facts and circumstances of this case, that the property in Kentucky, tangible and intangible, of the four railroads mentioned in the statement herein should be assessed against these defendants, or either of them, then these defendants say that this assessment has already been made by the State Tax Commission for each of said years; that is to say, the tangible property of each of said corporations has been assessed; the value of the capital stock of each of said corporations has been ascertained; the total value of the tangible and intangible property of each of said companies has been ascertained and all the taxes paid thereon; * * *

“Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of * * * the Constitution of the United States, particularly the Fourteenth Amendment thereof.

“And so it is that these defendants say that if the Court should hold that the Southern Railway Company is subject to any assessment in this State by reason of any ownership, operation, lease or control of the properties of any or all of the lines of railroad mentioned herein, then all values inherent therein, either tangible or intangible, have already been assessed by the proper assessing officers of the State of Kentucky, and to attempt to add to that assessment would be a violation of * * * the Constitution of the United States, particularly the Fourteenth Amendment thereof * * *” (R. 62, 63).

The cases were submitted on the pleadings, the answers to the interrogatories, the exhibits and stipulations of fact.

In addition to the facts stated, *supra*, and others that will be hereafter referred to, it appeared that the Cumberland Railroad had less than thirteen (13) miles of railroad lines situated in the mountains of Kentucky; that the Cumberland Railway had less than two (2) miles in Kentucky on the Tennessee

border, and that the main line of the Mobile and Ohio from St. Louis to Mobile touched one corner of the State of Kentucky for a distance of thirty-eight (38) miles, without entering any city of size (R. 37, 38, 79, 80).

The County Court dismissed each of the petitions and on appeal by the Commonwealth the Circuit Court also dismissed each of the petitions.

The Court of Appeals of Kentucky held that nothing in connection with the Cumberland Railroad, the Cumberland Railway or the Mobile and Ohio Railroad served to bring the Southern Railway Company of Virginia into Kentucky for taxation, so those roads will not be hereafter referred to.

However, the Court of Appeals decided that the Southern Railway Company in Kentucky was but an alias for the Southern Railway Company of Virginia, and in an opinion reported in 193 Ky. 474 (R. 128), reversed the judgment in each case saying in part as follows:

“It is our conclusion, therefore, that the Court should have assessed against defendant (Southern Railway Company of Virginia), Kentucky’s portion of its intangible property assessed by the proportion of the mileage that the lines nominally operated by the ‘Southern Railway Company in Kentucky’ bear to the entire mileage of defendant’s system estimated according to the method provided by the Statute * * *

“The Commonwealth in these cases recognizes the right of the defendant to credit the

amount of taxes which may be assessed herein by the amount of the taxes paid for the respective years on intangible property assessed by the 'Southern Railway Company in Kentucky,' which according to our opinion is all the relief growing out of that fact to which the defendant is entitled. * * * We have, therefore, concluded to remand the case to the Circuit Court with directions that it proceed to ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky, according to the prevailing rule of law upon the subject."

On the return of the case to the Circuit Court amended pleadings and additional stipulations were filed to emphasize what had already appeared in the record, to wit:

That for the first three years here involved the Southern Railway Company of Virginia did not directly or indirectly own, operate, lease or control the C. N. O. & T. P. Railway Company, that Danville, Kentucky (the most southern eastern terminus of the Southern Railway Company in Kentucky), was one hundred forty (140) miles north of Harriman Junction, Tennessee, the nearest point of the lines of the Southern Railway Company of Virginia, that there was, therefore, a gap exceeding one hundred forty (140) miles in length between the one hundred twenty-seven (127) miles of road in Kentucky and the other nine thousand (9,000) miles of plaintiff-in-error's lines unless the mileage in Kentucky be considered a part of its line from New Albany, Indiana,

to East St. Louis, Illinois, which lines were less than five hundred (500) miles in length (R. 131, 136, 139, 143).

The additional pleadings and stipulations also emphasized what had previously appeared in the record, to wit:

That prior and subsequent to January, 1917, the C. N. O. & T. P. Railway Company was owned by a corporation known as the Southwestern Construction Company. The Southern Railway Company of Virginia did not directly or indirectly own or control the Southwestern Construction Company prior to January, 1917; that as of January, 1917, the Southern Railway Company of Virginia and the Alabama Great Southern Railway Company (of whose stock the Southern Railway Company of Virginia owned a majority) each increased their prior holdings in the Southwestern Construction Company so that together they control the majority of the stock of the Southwestern Construction Company (R. 139, 143). (That this did not mean that the Southern Railway Company of Virginia owned itself a majority of the voting stock of the C. N. O. & T. P. Railway Company is so plain an arithmetical proposition that we do not think it worth while to figure it out.)

That effective January, 1917, the executive and other officers of the Southern Railway Company of Virginia became corresponding officers of the C. N. O. & T. P. Railway Company and since that time there has been supervision of operation of the C. N. O. & T. P. Railway Company (R. 143).

The amended answers also again pleaded the constitutional question here invoked, to wit: That any franchise tax would be violative of the due process clause of the Fourteenth Amendment to the Constitution because such tax would be based upon property, values and earnings wholly outside of the State of Kentucky (R. 134, 141).

On the resubmission of the case to the Circuit Court following its return from the Court of Appeals, that Court proceeded in obedience to the mandate of the Court of Appeals to:

“* * * ascertain the amount of intangible property which should be assessed for each of the years involved in Kentucky according to the prevailing rule of law upon the subject.”

The Kentucky franchise tax involved is provided for in Kentucky Statutes 4077-4081 inclusive. For the convenience of the Court copies of these Statutes are annexed as an appendix to this brief.

This franchise tax has been declared both by this Court and by the Kentucky Court of Appeals to be a property tax, *i. e.*, a tax on the intangible property of the corporation.

Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499.

510. “It has been held by the Kentucky Court of Appeals, and by this court, that the ‘capital stock of the corporation,’ here referred to, includes its entire property, of every kind

and description, tangible and intangible, and that what is called a 'franchise tax' is nothing else than a tax upon the intangible property of the company in Kentucky. *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 639, 641; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 154; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 180; *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 167; *Marion National Bank v. Burton*, 121 Ky. 876, 888."

This definition of the franchise tax is affirmed in the first opinion in the instant case (R. 120):

"* * * any franchise tax, which, it has been held, is but another name for intangible property."

These franchise tax statutes have already been digested by this Court in **L. & N. v. Greene**, 244 U. S. 522, and in that case this Court has stated the three steps necessary in the ascertainment of the value of this intangible property or franchise:

539. "Under this system it is obvious that there are three principal steps in the process of ascertaining the value of the intangible property, taxable in Kentucky, of companies operating lines of railroad extending within and beyond the limits of the State. These are:

"(1). The fixing of the value of 'the capital stock of the corporations;' which as construed in previous cases, means the total value of all its net assets, tangible and intangible, within and without the State;

“(2). the apportionment to Kentucky; and
“(3). the elimination of the value of the
tangible assets.”

This Court has likewise already found in the L. & N. case, that the method of first ascertaining the total value of the capital stock, i. e., the total value of the tangible and intangible property of the corporation is as follows:

540. “In such cases there are (at least) two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan. In the present case the latter was followed.”

Also in the instant case the capitalization-of-income plan was used.

Examination of the records show that in the interrogatories annexed to the petition, the defendants were required to and did answer the following interrogatories:

(Interrogatory No. 2) “What were the names of the railways which were owned, operated, leased and controlled by defendant? Give the length of each line, including the lines operated in the name of defendant, and those operated in other names but of which defendant owned a majority of the capital stock?

(Interrogatory No. 7). “What was the total of the railway operating revenue for each of the roads listed in answer to question two above?

(Interrogatory No. 8). "What was the total railway operating expenses for each of said roads?

(Interrogatory No. 9). "What was the total railway tax accruals for each of said roads?

(Interrogatory No. 10). "What was the total non-operating income for each of said roads?" (R. 11, 52.)

No questions were ever asked regarding the capital stock or bonded indebtedness of any of the companies. In other words, there is no information in the record on which the tax could have been based except the capitalization-of-net-income.

It is provided in the statutes, in the case of an interstate carrier operating both in and out of the State, that the income and mileage of the particular carrier itself is not the basis of the tax, but that the net income and mileage on which the tax is based is the net income and mileage of the lines "operated, owned, leased or controlled." (Kentucky Statutes 4079). Hence the questions, *supra*, regarding mileage and net income of the owned, operated, leased or controlled lines. According to the statute Kentucky's proportion is:

"* * * that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this State bears to the total length of the lines, operated, owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of corporate franchise of such corporation

liable for taxation in this State" (Kentucky Statutes, 4081).

In other words, the total net income from all lines owned, operated, leased or controlled is used. Likewise the mileage of all of the lines owned, operated, leased or controlled is used.

It was stipulated that for all of the years involved the Southern Railway Company in Kentucky and each of the other roads in Kentucky in which the Southern Railway Company of Virginia had any stock control, including the C. N. O. & T. P. for the last two years had made full reports and had paid to the proper State officers full taxes on their respective tangible and intangible property.

(Stipulation No. 17, R. 40.) "During each of the years involved, the Southern Railway Company in Kentucky, Cumberland Railroad Company, Cumberland Railway Company and the Mobile & Ohio Railroad Company, by their respective officers, or during Federal control by the officers of the Director General, filed with the State Railroad Commission, State Board of Valuation and Assessment, and the Tax Commissioner of Kentucky, full reports showing the result of all of the operations, etc., of the respective road as required by Statutes, and each Company paid the full tax assessed on its tangible and intangible property."

(Stipulation No. 2, R. 144) "For each year it (C. N. O. & T. P.) reported to the State Tax Commission in its own name and was so taxed

on the basis of the assessments set out in the amended answer."

The amended answers had alleged that for the years 1917 and 1918:

"* * * The Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition including the C. N. O. & T. P. Railway Company or the officers of the Director General of Railroads filed with the Kentucky State Railroad Commission, the State Board of Valuation and Assessment, and the State Tax Commission of Kentucky full reports showing the result of all of the operations of each of said lines of road as required by Statute and each Company or the officers of the Director General of Railroads paid the full tax assessed on its tangible and intangible property" (R. 140, 141).

Although the intangible value is ascertained by capitalizing net income and although the Southern Railway Company in Kentucky was operated jointly (with one exception), at a very heavy loss so that there was no net income, and although it was conceded that the Southern Railway Company in Kentucky and the other roads in Kentucky had paid full taxes on their respective tangible properties and on their respective intangible properties, nevertheless by taking the net income on the lines owned, operated, leased or controlled outside of the State and taking Kentucky's proportion according to mileage, the State court found that there was a very large additional intangible value to the heavy

losing lines of the Southern Railway Company in Kentucky, and assessed such value against the plaintiff-in-error, Southern Railway Company of Virginia.

The exact results of operations of the "Southern Railway Company in Kentucky" for the years involved were shown without contradiction to be:

1914—Net Loss	\$199,032.45
1915—Net Loss.	181,624.96
1916—Net Loss.	12,459.48
1917—Net Income.	112,075.66
1918—Net Loss.	605,191.04

(Exhibit Answers to Interrogatories, R. 212, 214, 216, 217A, 217C.)

The tax for any given year is based on the result of operations of the year previous. In other words, the 1915 tax is based on the 1914 figures, and so on.

Notwithstanding these heavy losses and notwithstanding that the Southern Railway Company in Kentucky had paid full taxes on its tangible and intangible property, the State Court by capitalizing the net income derived outside of the State, found that such outside net income added a very large intangible value to the heavy losing line in Kentucky as follows:

1915.	\$ 972,962.00
1916.	None
1917.	2,018,561.00
1918.	1,730,090.00
1919.	3,028,592.00

(R. 145, 146.)

It is apparent from a glance at the above that there is no relation between the earnings in Kentucky and the franchise assessment, the franchise being fixed at more than Two Million Dollars for 1917, when the loss the preceding year was Twelve Thousand, and at One Million Seven Hundred Thousand Dollars when there was a profit of One Hundred Thousand Dollars, and at Three Million Dollars when the loss was more than Six Hundred Thousand Dollars. The exact calculations used in arriving at the above assessment are annexed as an appendix to this brief. However, we will here summarize the calculation for the last year involved as illustrative of the method. Thus the tax for 1919 was based on the result of operations for the year ending December 31, 1918:

The net railway operating income of the Southern Railway Company of Virginia and that of the lines owned, operated, leased and controlled was.....	\$ 32,969,380.58
The C. N. O. & T. P. after January, 1917, being considered a controlled road, its income was added.....	3,047,946.55
Total.	<u>36,017,327.13</u>
Capitalized at 7%, total value tangible and intangible property.	514,533,244.71
There was then deducted the total outside excess tangible values, i. e., shops, terminals and double tracks of the Southern Railway Company of Virginia, and the owned, operated, leased and controlled roads..	
	\$20,160,065.06
There was also deducted the total outside excess tangible values; i. e., shops, terminals, and double tracks of the C. N. O. & T. P. Railway...	
	<u>2,046,735.53</u>
Total outside excess tangible values.....	82,206,800.59
Deducting total tangible outside values, we have.....	<u>432,326,444.12</u>

Entire mileage, Southern Railway Company of Virginia, and owned, operated, leased and controlled roads.	9,601.83
Entire mileage, C. N. O. & T. P.	337.27
Total mileage.	9,939.10
Mileage in Kentucky, owned, operated, leased and controlled lines, i. e., Southern Rail- way Company in Kentucky, Mobile & Ohio, Cumberland Railroad, and Cumberland Railway.	227.11
Ky. mileage, C. N. O. & T. P.	197.50
Total Kentucky mileage.	424.61
Proportion Kentucky to total mileage 4.273%—4.273% of \$432,326,444.12 gives total value in Kentucky. . .	18,473,308.96
Equalized at 85% (all property was equalized at 85%) . .	15,702,312.62
Values heretofore paid on tangible and intan- gible property in Kentucky by Southern Railway Company in Kentucky, Mobile & Ohio Railway, Cumberland Railroad and Cumberland Railway.	3,500,512
Values heretofore paid on tangible and intan- gible property in Kentucky by C. N. O. & T. P.	9,173,208
	12,673,720.00
Omitted Southern Railway Company of Virginia franchise value in Ken- tucky.	\$3,028,592.62

The method for each of the other years was the same except that for the first three years the Southern Railway Company of Virginia was held not to have controlled the C. N. O. & T. P. and no figures relating to that road were included.

Judgments were entered assessing the omitted value of the franchise or intangible property of the Southern Railway Company of Virginia at the above figures, to wit:

1915.	\$ 972,662.00
1916.	None
1917.	2,018,561.00
1918.	1,730,090.00
1919.	3,028,592.00

(R. 145, 146.)

and the cases were again taken to the Court of Appeals.

There is in Kentucky a rule of law to the effect that the opinion on the first appeal whether right or wrong is binding not only on the lower court, but on the Appellate court on the second appeal. The rule is thus stated in **Hopkins v. Adam Roth Grocery Co.**, 105 Ky. 357:

“But the law as first determined—right or wrong—is the law of the case, and must control, not only the lower court upon a return of the case, but also this court in any subsequent appeal. Opinion of appellate court on first appeal can not be revised in the same cause upon a second appeal.”

The opinion on this second appeal is reported in **204 Ky. 388** (R. 153). On this appeal the State Court made distinction between the two cases and held that for the first three years and before the Southern Railway Company of Virginia and the Alabama Great Southern Railway Company together acquired a control of the stock of the Southwestern Construction Company (which company owned the stock of the C. N. O. & T. P. Railway Company), that there was such a gap between the

lines of the Southern Railway Company in Kentucky and the other lines of the Southern Railway Company of Virginia that the line in Kentucky could only be prorated with the line from New Albany, Indiana, to East St. Louis, Illinois. This calculation resulted in no additional assessment. Therefore, the judgment of the lower court as to the first three years was reversed.

The Court of Appeals, however, found that during the years 1917 and 1918, the Southern Railway Company of Virginia controlled the C. N. O. & T. P. Railway Company; that this served to close the gap between the lines in Kentucky and the balance of the system, and therefore affirmed the judgment of the lower court assessing against the Southern Railway Company of Virginia an additional franchise or intangible property value of

\$1,730,090.00 for the taxing year 1918.

3,028,592.00 for the taxing year 1919.

The Court of Appeals also affirmed the judgment as being joint against the Southern Railway Company of Virginia and the Director General of Railroads, although the roads for those years were in the control of and being operated by the Director General of Railroads, and also affirmed that part of the judgment assessing a twenty per cent (20%) penalty against the Director General.

A petition for rehearing was filed, directly calling the Court's attention to the error in assessing judgment against the Southern Railway Company

of Virginia for the years when the railroad properties were in the possession of and being operated by the United States Railroad Administration, and to the error in assessing a penalty against the Director General of Railroads (R. 158).

The Court, without opinion, overruled the petition for rehearing (R. 176).

We submit that the judgment of the State Court should be reversed:

For the Southern Railway Company of Virginia and the Director General of Railroads because:

1. Assuming that the Southern Railway Company in Kentucky is but an alias for the Southern Railway Company of Virginia, nevertheless the proposed assessment is based upon property, values and net income derived from property wholly outside of the jurisdiction of Kentucky and therefore contrary to the due process clause of the Fourteenth Amendment to the Constitution.

2. The Southern Railway Company of Virginia owns no property and transacts no business in the State of Kentucky and any assessment against it for taxes on any of its property is contrary to the due process clause of the Fourteenth Amendment to the Constitution.

For the Southern Railway Company of Virginia because:

3. Under the Federal Statutes regulating the control and operation of railroads by the United

States Railroad Administration, no judgment could be rendered against the Southern Railway Company of Virginia for these taxes.

For the Director General because:

4. Under the Federal Statutes regulating the control and operation of railroads by the United States Railroad Administration, the Director General was not liable for a penalty.

ARGUMENT.

The above will be discussed in the order named.

I.

Assuming that the Southern Railway Company in Kentucky is but an Alias for the Southern Railway Company of Virginia, Nevertheless the Proposed Assessment is Based upon Property, Values and Net Income Derived from Property Wholly Outside of the Jurisdiction of Kentucky and Therefore, Contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution.

We insist that the Southern Railway Company in Kentucky and the Southern Railway Company of Virginia are separate and distinct corporations, that the Southern Railway Company in Kentucky is not an alias for the Southern Railway Company of Virginia, that the property of and business done by the Kentucky corporation is in no sense the property or business of the Virginia corporation. Nevertheless, so certain are we of this first point that for its purpose, we are assuming that the Kentucky

Court of Appeals was correct in holding that the Kentucky corporation was in fact the same as the Virginia corporation.

Even under this assumption the tax is unconstitutional because it brings into Kentucky for taxation property wholly outside of the jurisdiction of Kentucky.

A brief summary of facts is necessary:

The Southern Railway Company of Virginia for the particular years involved, *i. e.*, 1917 and 1918 (on which the taxes for 1918 and 1919 respectively are based), owned, operated, leased and controlled in States wholly outside of Kentucky in excess of nine thousand six hundred (9,600) miles of railroad lines (R. 81).

It owned in States wholly outside of Kentucky valuable terminals, shops and double tracks—in other words, outside excess tangible property—exceeding eighty million dollars in value (R. 41).

Its net railway operating income and that of its owned, operated, leased or controlled lines wholly outside of Kentucky for these years was as follows:

1917.	\$31,806,408.49
1918.	32,969,380.58

(R. 81.)

The line of road in Kentucky proposed to be assessed is the line in Kentucky of the Southern Railway Company in Kentucky. This line was only one hundred twenty-seven (127) miles in length (R. 81), and had no double tracks, roundhouses, shops or ter-

minals corresponding to those of the Virginia corporation referred to above (R. 78).

Its net railway operating income in 1917 was only One Hundred Twelve Thousand (\$112,000) Dollars and in 1918 its operations resulted in a net loss in excess of Six Hundred Five Thousand (\$605,000) Dollars (Exhibits 217A, 217C).

It is necessary to bear in mind that the tax assessed is the alleged intangible value of this one hundred twenty-seven (127) miles. That this is clear is manifest from the first opinion of the Court of Appeals as follows:

(R. 128) "It is our conclusion therefore, that the Court should have assessed against defendant (Southern Railway Company of Virginia) Kentucky's portion of its intangible property assessed by the proportion of the mileage that the miles nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the Statute."

It was conceded and stipulated that this one hundred twenty-seven (127) miles of road had fully reported to the proper officers of the State, and to the Boards for each of the years:

"* * * full reports showing the result of all of the operations, etc., * * * as required by Statute and * * * paid the full tax assessed on its tangible and intangible property."

In other words, it is conceded that this one hundred twenty-seven (127) miles of road presently proposed to be additionally taxed has already paid full tax on all of its tangible property in Kentucky and has already been assessed and fully paid the full value of its intangible property or franchise.

Stated in another way, it is conceded that this line of road has paid taxes on the full value of its separate intangible property or franchise; that the net income of One Hundred Twelve Thousand Dollars during the only year when it was operated at a profit instead of at a heavy loss has already been capitalized and the proper tax paid thereon.

It is obvious, therefore, that the State taxing authorities had before them in making the assessments, all the information on which to base the value of this line of road. The only fact or information even claimed to have been omitted in making the assessment is the fact (assuming as we are) that this line of road in Kentucky was owned and being operated by the Virginia corporation instead of by the Kentucky corporation.

The value, therefore, to be ascertained and taxed is simply the added value, if any, given to this road in Kentucky because of the assumption that it was owned by one corporation instead of another.

The State Court found that this alleged difference in ownership resulted in an additional value to the one hundred twenty-seven (127) miles of road in Kentucky of:

\$1,730,090.00 for 1918

3,028,592.00 for 1919.

This additional value is imputed to this one hundred twenty-seven (127) miles of road by virtue of the alleged difference in ownership in the face of the fact that this road has already been taxed on its net income of only One Hundred Twelve Thousand Dollars in 1917 and that in 1918 it was operated at an actual loss in excess of Six Hundred Thousand Dollars.

It is true that the outside excess tangible property was deducted, but such deduction only serves to make the tangible value the same and does not at all reach the question of intangible value.

Stated in another way, it is apparent that when the separate railroad in Kentucky admittedly paid the tax on its tangible and intangible property, the only item claimed to have been omitted in making the assessment was the earnings from the other nine thousand (9,000) miles of road wholly outside of Kentucky.

The constitutionality of this importation into Kentucky for taxation purposes of this net income admittedly earned outside of Kentucky and derived from property located outside of Kentucky, is the precise point for determination.

Since it is admitted that taxes have already been paid on all tangible property, the following table with reference to this one hundred twenty-seven (127) miles of road whose alleged added intangible

value is proposed to be assessed, will show that the business done and the earnings and operations in Kentucky bear no relation whatever to the additional tax imposed:

	Original Tangible and Intangible Assessment Originally Paid on.	Southern Railway Company in Ken- tucky Net Income.	Proposed Additional Assessment.
1914.....	\$2,128,789.00	*\$199,032.45	\$ 972,662.00
1915.....	2,128,789.00	* 181,624.96	None
1916.....	2,128,789.00	* 12,459.48	2,018,561.00
1917.....	2,137,072.00	112,075.66	1,730,090.00
1918.....	2,137,072.00	* 605,191.04	3,028,592.00

*Net loss.

We submit that the above figures demonstrate conclusively that Kentucky is attempting to bring into Kentucky for taxation, property situated outside of Kentucky's jurisdiction and that the tax is therefore unconstitutional.

We begin with the obvious proposition that a State cannot constitutionally tax any property beyond its borders.

Louisville & Jeffersonville Ferry Co. v. Ky., 188 U. S. 385.

In this case there was involved the question of whether or not the State of Kentucky could tax a franchise granted by the State of Indiana for a ferry across the Ohio River from Kentucky to the Indiana

shore. Such franchise was held non-taxable in Kentucky. The Court said:

"There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its situs in Indiana. While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government. Hence, this court, speaking by Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 429, said that, while all subjects over which the sovereign power of a State extends are objects of taxation, 'those over which it does not extend, are, upon the soundest principles, exempt from taxation.' That proposition, he said, could almost be pronounced self-evident.

"In *Cooley on Taxation*, the author, while conceding that the legislative power extends over everything, whether it be person, property, possession, franchise, privilege, occupation or right says that 'persons and property not within the territorial limits of a State cannot be taxed by it'; and that 'a State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power.' 2d Ed., pp. 5, 55, 159.

"We recognize the difficulty which sometimes exists in particular cases in determining the value of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporated hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporated hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana."

Conceding then that it is unconstitutional for a State to tax property beyond its borders, we next inquire as to the nature of the intangible property on which the franchise tax is based. This intangible property value is said to come from the added value given a railroad track or a telegraph line on account of the use to which it is put, or in other words, on account of the net income therefrom. This assumes the use to which a line of railroad is put usually results in earnings larger than that produced by the adjoining farm lands. Therefore, the line of railroad on account of these increased earnings is held

to have an increased value over the adjacent farm lands. It is this added value from net income that is the intangible property subject to taxation.

Thus this Court in **Columbus Southern Railway v. Wright**, 151 U. S. 470, in speaking of this added value of a railroad due to earnings, said:

480. "The roadway itself of a railroad depends for its value upon the *traffic* of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its *traffic*, as evidenced by the rolling stock and *gross earnings* in connection with its capital stock."

The Kentucky Court of Appeals in its first opinion in the instant case likewise recognized that this intangible value came from the use to which the railroad property was put:

(R. 120.) "It was discovered, not only in Kentucky but elsewhere, that in addition to their tangible property many corporations, because of the use of such property in the manner permitted by the sovereignty creating it or under whose permission it operated locally outside of the State of their creation, increased the total value of their property largely in excess of their tangible property, which excess grew out of the privileges conferred in the use of its tangible property, and such excess valuation is referred to in the books, sometimes as the corporation's franchise, but it is now come to be more generally designated as intangible property, and is universally regarded and held to be a legitimate subject of taxation."

It has been demonstrated conclusively that the use to which the one hundred twenty-seven (127) miles of railroad in Kentucky was put did not give to that line any added or intangible value, because such use resulted in large net losses for each of the five years with one slight exception. Obviously if the line in Kentucky had an added or intangible or franchise value, by reason of its assumed relation or connection with the lines outside of Kentucky, then such added value would have been apparent in the only way that such added value is ever apparent, to wit, by the earnings of the line in Kentucky.

For the first three years involved the State Court held that there was no additional intangible value to be added. However, it also held that for the last two years there was an added value to the line in Ken-

tucky, simply because the Southern Railway Company of Virginia and another road of whose stock the Southern owned a majority, together acquired a majority of the stock of the Southwestern Construction Company, which company in turn owned the stock of the C. N. O. & T. P., and simply because the executive and other officers of the Virginia corporation became the officers of the C. N. O. & T. P.

And yet it is uncontradicted that the one hundred twenty-seven (127) miles in Kentucky had never lost more than One Hundred Ninety-nine Thousand (\$199,000.00) Dollars during any of the years when the State Court said there was no added value, although during one of the two years when the State Court said there was added value, its actual loss was in excess of Six Hundred Five Thousand (\$605,000.00) Dollars.

It has been recognized where the lines of the common carrier extend through various States, that in ascertaining the added or intangible value of the lines in a particular State, *nothing else appearing*, it is proper for the particular State to take its mileage proportion of the total. This "system" idea, nothing else appearing, has been applied in cases of railroads, telegraph and express lines.

P. C. C. & St. L. Railway Co. v. Backus, 154 U. S. 421.
Western Union Telegraph Co. v. Massachusetts, 125
U. S. 530.

Adams Express Co. v. Ohio, 165 U. S. 194.

The Kentucky Court of Appeals based the present additional assessment on this "system" idea of taxation.

(First Opinion, R. 128.) "But, it is insisted that this would result in taxing in Kentucky property having no situs here. A sufficient answer to this is that under the conclusions we have reached the result is the same as if the Kentucky division had been actually operated in the name of the defendant, the same as is the operation of the Illinois Central Railroad Company and other foreign common carriers who pay a similar tax under the same statute. The authorities are unanimous in holding that the intangible property subject to local taxation is not to be estimated alone according to the business done on that division of the railway system located within the taxing authority, but it is to be proportioned according to the business done over the entire system of which the local line or division is a part."

Between, however, the general proposition referred to, that a State may not tax any property beyond its borders, and the "system" idea of valuation and assessment of an interstate carrier, a definite line has been drawn, to wit, the "system" idea cannot

be so used or extended as to bring into a State property or values outside of the State.

In other words, even though adopting the "system" plan of taxation where nothing else appeared, this Court has consistently declined to permit it to be used as it was used in the present case, where it can be shown that the result is to bring into the State property situated outside of the State.

Thus in **Fargo v. Hart**, 193 U. S. 490, the State of Indiana was attempting to and did assess a tax on the express company on the "system" plan according to mileage proportion, even though it appeared that the company had real estate of the value of two million dollars located outside of the State, and personal property in excess of fifteen million dollars located outside of the State. This Court, while recognizing the "system" plan of taxation, refused to permit it to be made the means of bringing into Indiana for taxation either real or personal property located outside of the State.

499. "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State

in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and bars of steel or coils of wire, from their organic connection with other rails or wires, and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line *in the absence of anything* more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system."

It will be observed that a particular State is permitted to use the system plan of taxation on the ground that there is an added value due to such system connection and operation. This added system value obviously is only because the line in the particular State is presumed to get business from lines out of the State which it would not get except for the system connection and unified operation. However, in the instant case it has been shown that the net result of operations in Kentucky, to wit, the large deficit for each year, with one exception, reflected all of the business that the line in Kentucky handled—both local business secured by it and through business secured on account of its alleged system connection with the rest of the line.

In other words, if the line in Kentucky received either freight or passenger patronage that would have been routed over some other railroad except for the alleged system connection, then such additional revenue is already reflected in the actual result of operations. Stated in another way, the figures given of net income for one year and heavy losses for the other four years include all of the business done by the lines in Kentucky, *i. e.*, such figures include all intrastate and local business which the line in Kentucky originated and also include all interstate and through business which it might not have received except for the alleged system connection with the lines outside of Kentucky.

But this Court, while conceding a "system" plan of taxation in the absence of anything more special then proceeds to hold that it may not be made a means of taxing property outside of the particular State. The opinion continues:

"It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside of the State, under the name of enhanced value or good will, *if it is not closely confined* to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make

use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense."

The Court likewise held that the inclusion of the property outside of the State was not merely a difference in valuation but involved a difference of principle.

502. "The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the Board was wrong. It involved an attempt to tax property beyond the jurisdiction of the State."

So in the instant case the difference in the taxation is not a mere difference in valuation but is a difference in principle.

The method of arriving at the total value of railroad property in Kentucky is not left to speculation. As stated by this Court in *L. & N. v. Greene*, 244 U. S. 522-540, there are two recognized methods, to wit, the stock-and-bond plan and the capitalization-of-income plan.

In the instant case the capitalization-of-income plan was adopted. The figures used in this plan are not figures based on guesswork or the opinion as to what the future might be, but are the *actual* figures of the previous year's operations. In other words, it has been demonstrated that the One Hundred Twelve Thousand (\$112,000.00) Dollar net income for one year has already been capitalized and that the additional tax here imposed is based on the actual

result of operations of the lines outside of the State. Kentucky is taxing net income made outside of its borders. Clearly this is not a difference in valuation but a difference in principle.

In **Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania**, 198 U. S. 341, the State of Pennsylvania assessed the railroad company on a mileage basis based on its total capital stock, although the railroad company had coal outside of the State of the value of more than One Million Seven Hundred Thousand Dollars, which was necessarily included in the valuation of the company's capital stock, upon which the tax was charged. Reversing the case, this Court said:

356. "The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisal it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in a foreign State * * *

"So, if the State cannot tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.

"We think the State court is right in deducting as it does, the value of the tangible property, when permanently held in another State, and we think that for the same reason the same rule should obtain in the case of tan-

gible property situated, as this coal was. We cannot see the distinction, so far as the question now before the Court is concerned, between a tax assessed upon property, *eo nomine*, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

The Court again held that where inclusion of such outside value appeared, it did not involve a mere matter of difference of opinion as to value but involved a difference in principle.

358. "It is true that in general an appraisal of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is imma-

terial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction."

We submit that there is no difference in principle between this Pennsylvania case "where the appraisement is arrived at by including therein tangible property which is beyond the jurisdiction of the State and which, therefore, the assessing officers had no jurisdiction to appraise" and the instant case "where the appraisement is arrived at by including therein" *intangible* "property which is beyond the jurisdiction of the State and which, therefore, the assessing officers had no jurisdiction to appraise." This case, however, continues:

358. "The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

The Court after quoting liberally from the case of **Louisville & Jeffersonville Ferry Co. v. Kentucky**, 188 U. S. 385, concluded:

360. "It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that State to foreign States for the purposes of sale, with no intention that it should ever return to its State of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way."

In the case at bar it is true that the earnings on the Company's double track profitable lines through Virginia, the Carolinas, etc., gave to those lines in Virginia and the Carolinas, etc., an added value, but we submit that such earnings did not give to the line in Kentucky any added value and that the inclusion of those earnings for taxation in Kentucky is just as unconstitutional as though that added value in Virginia and the Carolinas, etc., had been in the form of tangible instead of intangible property.

Illinois Central Railroad Co. v. Green, 244 U. S. 285.

Here again the Court reaffirmed the idea that organic unity of the system plan of taxation could not be made the means of unlawfully taxing property situated outside of the State.

562. "The claim for an allowance by reason of the treasury securities and the terminals situate in other States is based upon the principle laid down in *Fargo v. Hart*, 193 U. S. 490, 499, and similar cases, to which we adhere, that a State cannot tax property outside of its jurisdiction belonging to persons domiciled elsewhere, and that although the fact that property is part of a system and has its actual use only in connection with other parts of the system may be considered by the State in taxing that portion of the system which is within its borders, yet the notion of organic unity must not be made the means of unlawfully taxing property without the State."

Wallace v. Hines, 253 U. S. 64.

In this case the Court thus clearly holds that the reason for allowing a State to look beyond its borders when taxing property is to get the true value of things within, and that no property situated elsewhere can be included unless it can be seen in some plain, and fairly intelligible way that such outside property adds to the value of the road within the State:

18. "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of trade and commerce, that gives them a value above what they otherwise would possess. The purpose is not to expose the load of the system to a partial distribution, in other words, to open to taxation what is not within the State. *Therefore no property of such an intimate and situated character can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the real and the rights concerned in the State.* Since the possession of lands secured by mortgages of lands in other States or of a land grant in another State or of other property that adds to the value of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern Ry. Co. v. Arkansas, 228 U. S. 246, 268.* In this case, it is alleged, the tax commissioner's valuation included some of the land described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taxing of property without due process of law. *Fargo v. North Dak.* 228 U. S. 420."²

It is submitted that while the large earnings on the lines outside of Kentucky may and do give to such outside lines added value, that it cannot be shown "in some plain and fairly intelligible way," nor can it be shown in any way that such earnings "adds to the value of the road and the rights exercised in the State" of Kentucky.

Alpha Cement Co. v. Massachusetts, 268 U. S. 203.

This case involved the validity of an excise tax of the State of Massachusetts as applied to a company doing an interstate business. The amount of tax was made dependent upon the proportion of tangible property and the proportion of income allocated to the State of Massachusetts. The tax was held unconstitutional as a burden on interstate commerce and also as in violation of the Fourteenth Amendment. This Court said:

218. "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with

conclusions reached in later opinions and is now definitely disapproved.

“Union Tank Line Co. v. Wright, 249 U. S. 275, 282, et seq., pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a State. We there declined to follow the rule applied in Pullman’s Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, and held that *determination of real value with fair accuracy is essential*. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

“The local business of a foreign corporation may support an excise measure in any reasonable way, if neither interstate commerce nor property beyond the State is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State. * * * It cites approvingly St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 364; and there this Court said:

“‘So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in Postal Tel.

Cable Co. v. Adams, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." " "

The intangible property that Kentucky has a right to tax is the increased value, if any, that the one hundred twenty-seven (127) miles of road in Kentucky has on account of the net income that come from the use to which such tangible property is put. This is well illustrated by the following illustration from this Court in the case of **C. C. C. & St. L. Railway Co. v. Backus**, 154 U. S. 439, 446.

"Suppose there be two bridges over the Ohio, the cost of construction of each being the

same, one between Cincinnati & Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other."

The instant case presents the same state of facts as if the two bridges referred to by the Court belonged to the same corporation; one bridge between the two smaller towns being located in Kentucky, and the other bridge between two larger cities being located outside of the State. Obviously, the earnings from the bridge between the two large cities outside of the State would add nothing whatever to the bridge between the two small towns inside of Kentucky, and yet the State of Kentucky is attempting to lump the earnings from the two bridges and is claiming that the bridge in Kentucky has the same intangible value for taxation purposes as the bridge outside of the State simply and solely because it is claimed that both bridges belonged to, and were being operated, by the same corporation.

The record of earnings of the one hundred twenty-seven (127) miles in Kentucky for the only year in five when there were earnings, and also the record of losses, it is stipulated, was before the State taxing officers and full taxes assessed were paid thereon. The only fact now claimed not to have been before the assessing officers at that time and the only fact

used by the Court in increasing the assessment, was the fact (which we are here assuming) that the line of road in Kentucky belonged to a rich instead of a poor company. Stated in another way, the only fact not considered in making the original assessment and the only fact used by the Court in making the additional assessment was the fact that instead of the lines in Kentucky belonging to the Southern Railway Company in Kentucky, it in fact belonged to Southern Railway Company of Virginia, which company from operations disconnected and outside of the State made profits instead of losses.

We submit that when the added or intangible value which the State has a right to assess is based on earnings and when the results of those earnings are already known, that it makes no difference by whom the corporation is owned or operated. The added use of the railroad, looking back as we are here, to 1918 and 1919, is not changed simply because it is now decided, not that there was any additional use, not that there was any additional net income, but solely because there is now claimed to be a different ownership.

The only item of value alleged to have been omitted originally is the added value, if any, due to the change in ownership.

Assume that in 1918 the Southern Railway Company of Virginia attempted to dispose of its stock in the Southern Railway Company in Kentucky and had contracted with a purchaser to the effect that the purchaser was to pay on the full value of the

property, both tangible and intangible, and that such intangible value should be determined by the result of operations for the calendar year 1918, we submit that no Court, if called upon to fix the value, would ever require a purchaser to pay a Three Million Dollar intangible valuation in the face of a Six Hundred Thousand Dollar loss in Kentucky, simply because the Southern Railway Company of Virginia elsewhere and out of the State had itself made large net earnings.

And yet that is exactly the situation here.

It may not frequently happen that an interstate carrier so keeps its records as to be able to show separately the business and earnings of the lines within a particular State.

However, it appears here that the separate "Southern Railway Company in Kentucky" was incorporated in 1894. The first time that it was ever held that a railroad company was liable for a franchise tax in Kentucky was in **Southern Railway Co. in Kentucky v. Coulter**, 100 Ky. 657, decided June 10, 1902, and more than nine years after the incorporation of the Kentucky corporation. Up until the Coulter case no one thought that a railroad company was liable for a franchise tax in Kentucky. It needs, therefore, no argument to show that when the "Southern Railway Company in Kentucky" was incorporated in 1894, no question of franchise tax could have been involved.

Furthermore, the one hundred twenty-seven (127) miles of road in Kentucky began at a definite

point, to wit, Louisville, Kentucky, on the Ohio River and extended eastward to definite points, to wit, Georgetown, Lexington, Burgin and Danville, Kentucky, where they definitely ended at the C. N. O. & T. P. lines.

The books, records and officers of the "Southern Railway Company in Kentucky" were at all times available to the Commonwealth for inspection or examination, or both. Nevertheless the Commonwealth has never even insinuated in the record that the sworn statement of earnings of the lines in Kentucky, to wit:

1914—Loss.	\$199,032.45
1915—Loss.	181,624.96
1916—Loss.	12,459.48
1917—Gain	112,075.66
1918—Loss.	605,191.04

do not correctly and truly represent all the result of operations of the one hundred twenty-seven (127) miles of road and correctly show all business whether it be interstate or intrastate.

With the above undisputed showing of not earnings or net income, but losses and the stipulation that for the years involved the one hundred twenty-seven (127) miles of road in Kentucky has paid full taxes on its tangible and intangible property it cannot be seen in any fairly intelligible way how the earnings on the lines outside of Kentucky have added anything whatever to the one hundred twenty-seven (127) miles of road in Kentucky and the importa-

tion of those earnings into Kentucky for taxation is clearly unconstitutional.

Our point in substance is that when you capitalize net income for taxation purposes that where it can be definitely shown, as has been shown here, that the net income arises wholly outside of the State, that it is just as unconstitutional to bring such net income into the State for taxation as it would be to bring into the State for taxation tangible property located outside of the State.

There is no difference in principle between taxing tangible property located outside of the State and taxing intangible property located outside of the State.

Again, it has been held by this Court that if a system plan proved to be arbitrary or the consequent valuation grossly excessive, it must be condemned because of conflict with the Fourteenth Amendment.

Union Tank Line v. Wright, 249 U. S. 275.

In this case the State of Georgia attempted to assess a franchise tax against the Tank Line Company on the basis of the proportion of mileage in and out of the State. It was shown that such basis would result in an assessment in excess of the value of all of the cars that were within the State during the taxing period. This Court reversed the judgment of the Supreme Court of Georgia because such system taxation proved to be arbitrary and excessive, and said:

282. "A State may not tax property belonging to a foreign corporation which has never come within its borders—to do so any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the State according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many States often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western Union Telegraph Co. v. Massachusetts*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). *But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both.* *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co. v. Ohio*, 165 U. S. 194; s. c. 166 U.

S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453. * * *

“During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a ‘true’ value of \$830.00. Thus the total there subject to taxation amounted to \$47,310.00—the challenged assessment specified \$290,196.00.

“We think plaintiff-in-error’s property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

“Pullmans’ Palace Car Co. v. Pennsylvania, *supra*, relied on by defendant-in-error, contains the following passage which seems to uphold the Georgia rule—‘The mode which the State of Pennsylvania adopted to ascertain the proportion of the company’s property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all of the States through

which these cars ran, the company would be assessed upon the whole value of its capital stock and no more.' But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as *obiter dictum*, and we cannot now approve or follow it."

We submit, therefore, that to assess an intangible valuation of One Million Seven Hundred Thirty Thousand Dollars for 1917 when the only earnings in the State have already been capitalized and paid on, and to assess a Three Million intangible valuation on the lines in Kentucky which show a Six Hundred Thousand Dollar loss, demonstrates that the system plan invoked by the State Court "is arbitrary and the consequent valuation grossly excessive" and must, therefore, be condemned because in violation of the due process clause of the Fourteenth Amendment to the Constitution.

II.

The Southern Railway Company of Virginia Owns no Property and Transacts No Business in the State of Kentucky and any Assessment Against it for Taxes on any of its Property is Contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution.

Under the first heading we have assumed that the line in Kentucky actually belonged to and was being operated by the Virginia corporation and have shown that even under such state of facts the proposed tax is unconstitutional. However, it is not a fact that the plaintiff-in-error, Southern Railway Company of Virginia owns any property or transacts any business in the State of Kentucky, as can be clearly demonstrated.

As shown above, the Southern Railway Company of Virginia was incorporated in February, 1894, and owns and operates a line of road in excess of nine thousand (9,000) miles from Washington, D. C., south. The Southern Railway Company in Kentucky was incorporated in August, 1894, to take over the one hundred twenty-seven (127) miles of road formerly owned and operated by the "Louisville-Southern Railroad Company" when that road was sold by foreclosure in the Federal Court. The Southern Railway Company of Virginia owns all of the stock of the Southern Railway Company in Kentucky, except directors' shares. The executive officers of the two corporations were the same.

When the Southern Railway Company in Kentucky acquired the property of the "Louisville-Southern Railroad Company" in 1894, it also acquired a certain number of locomotives, passenger cars, box cars, etc. Since that time when any of this equipment has become unfit for service or out of repair it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway Company in Kentucky. This equipment has been used by the Southern Railway Company in Kentucky in common exchange with Southern Railway Company of Virginia, *i. e.*, portions of the equipment have been used by the Kentucky corporation in Kentucky, and portions by the Virginia corporation outside of Kentucky, but where any of this equipment was used by the Virginia corporation, such use has been without charge to that company in consideration of that company's furnishing to the Kentucky corporation a like number of engines and cars without charge. (Stipulation 2, R. 76, 77.)

"Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in Stipulation 2, it has leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of various other railroads and has done this under the usual traffic arrangement obtaining among railroads and for such use of equipment has paid to the defendant, Southern Railway Company of Virginia and other railroads the regular charges for such hire of equipment." (Stipulation 3, R. 77.)

By Stipulation No. 5, it is expressly conceded that:

“Except for the ownership of stock of the four railroads specified in Stipulation 1, and except for the equipment detailed in Stipulation 3, the Southern Railway Company of Virginia owns otherwise no property or lease of any kind in the State of Kentucky and transacts no business in the State of Kentucky except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, it owns and operates said lines of railroad or any of them within the meaning of the Kentucky Statutes, and this question is submitted to the Court on all of the facts.” (R. 78.)

It is admitted, therefore, that the Southern Railway Company of Virginia owns no property and transacts no business in the State of Kentucky unless it owns property and transacts business there by virtue of:

1. The ownership of the stock of the Southern Railway Company in Kentucky.
2. On account of the equipment interchange referred to in Stipulation 3.
3. The solicitation and routing to their destination of freight and passengers.

These will be considered in the inverse order.

Green v. C. B. & Q. Ry. Co., 205 U. S. 530.

The exact question presented was whether or not the railroad company was doing business in the State

of Pennsylvania. The facts, as stated in the opinion, were:

“For the purpose of conducting this incidental business (the solicitation of freight and passengers) the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant’s line. For conducting this business several clerks and various traveling passenger and freight agents were employed, who reported to the agent and acted under his direction.”

In other words, the C. B. & Q. Railway Company did in Pennsylvania identically what the defendant corporation does in Kentucky, namely, have an agent here to solicit freight and passenger business.

This Court, however, held that this did not constitute doing business within the State of Pennsylvania. The Court’s language is as follows:

“The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute ‘doing business’ in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it.”

In **Philadelphia & Reading v. McKibben**, 243 U. S. 264, this Court reaffirmed its holding in the Greene case:

“Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be ‘doing business’ in every State. * * * Nor would the fact, if established by competent evidence, that ‘subsidiary companies’ did business within the State, warrant a finding that the defendant did business there.”

Therefore, the solicitation of freight and passengers does not bring the Virginia corporation into Kentucky for taxation purposes.

Nor does the interchange of equipment between the two corporations destroy the identity of either or bring the Virginia corporation into Kentucky for taxation.

Stipulation 4 simply concedes what is otherwise common knowledge, to wit: That all railroads interchange equipment with other railroads on the standard prices.

“No railroad operates entirely with its own rolling stock; that all such rolling stock equipment is no more or less common use among the different railroad, and for such use each railroad pays to the owning railroad the regular standard prices.” (R. 77.)

It has never been assumed that such interchange constituted "doing business" in every State where a railroad's equipment might be carried in the channels of interstate commerce. If this were so, each railroad would be "doing business" in practically every State in the Union.

It, therefore, only remains to be seen whether or not the stock ownership of the Kentucky corporation by the Virginia corporation serves to bring the Virginia corporation into Kentucky for taxation.

The Commonwealth attempted to show that the Kentucky corporation had been merged into the Virginia corporation by asking the following interrogatory:

"Q. In the statistics of Railways in the United States compiled by the Interstate Commerce Commission for the year ended June 30, 1913, opposite the name of the 'Southern Railway in Kentucky' are these words: 'Merged in Southern Railway Company, July 1, 1912.' Is that statement true? And if so, what change, if any, has been made since and when?" (R. 20.)

The following answer to that interrogatory shows that there had been no merger of the two corporations and that the above notation was made simply because under the Interstate Commerce Commission rules one report covering the operating results of these two companies had been filed, and a separate report was not required.

"A. The notation 'merged in Southern Railway Company, July 1, 1912,' was intended

to mean that the operating results of the Southern Railway Company in Kentucky has been consolidated with those of the Southern Railway Company, as, under the rules and regulations of the Interstate Commerce Commission, a separate operating report for the Southern Railway Company in Kentucky was not required.

“The method of consolidating these reports had not been changed since that date.” (R. 21.)

The Commonwealth likewise read into the record certain pages of the stockholders' reports, in an effort to show that the two corporations reported themselves as being the same. It will be noted, however, from these reports for the two years involved, to wit, 1917 and 1918, that where the lines in Kentucky are mentioned, there appears the following: “Southern Railway in Kentucky.” (R. 108-113.)

It is true that these stockholders' reports in giving mileage by States for two of the years that are not involved in this appeal, to wit, 1914 and 1915, classifies the mileage in Kentucky under the general heading of “Owned.” (R. 88 for 1914 and R. 94 for 1915.) No such general statement is contained, however, in the stockholders' reports for 1916, 1917 or 1918. Furthermore, a mere general statement in a stockholder's report is made without the attempt to be legally exact and does not serve to change the fact that the mileage in Kentucky was owned by a separate corporation.

That all of the above facts do not warrant eliminating the Kentucky corporation as was done by the State Court is shown by the opinion of this Court in **Peterson v. Chicago, Rock Island & Pacific R. R. Co., 305 U. S. 364.**

This Peterson case is a great deal stronger on its facts as to the similarity and identity of corporations than is the instant case.

The Chicago, Rock Island & *Pacific* Railroad constructed a line through several States of the Union to the Red River on the Texas border. The line of railroad from that point on to Fort Worth, Texas, was constructed by the Chicago, Rock Island & *Gulf* Railroad, all of whose stock was owned by the Pacific Company. Through trains were run over the Gulf Railroad and on the Pacific Railroad to points outside of Texas without even a change of train crews. At the point where the line of the Pacific Railroad Company ended and the Gulf Railroad began there was no city or town and the trains did not even stop. The same trainmaster controlled the operation of trains on both roads, the same train crews carried through trains on both railroads, the money with which the Gulf Railroad had been constructed was furnished entirely by the Pacific Company which owned all of its capital stock, except enough to qualify directors. Further, the Texas Railroad, for a long period of time had no rolling stock of its own and:

375. “* * * During the time it had no equipment of its own, it rented rolling stock from various railway companies, but principally from the Chicago, Rock Island and Pacific Railway Company, and paid therefor prices prevailing between other lines of railway in the State of Texas. * * *

“* * * Outside the Pullman cars, which were in each passenger train, nearly all the passenger equipment used by the Chicago, Rock Island & Texas Railway Company belonged to the Chicago, Rock Island & Pacific Railway Company, for which it paid rental, as provided for under the terms of the contract herein first referred to. * * *

The Texas Company “does not own any passenger equipment other than the Pullman cars which are used in each of its passenger trains; it rents its passenger equipment from the Chicago, Rock Island & Pacific Railway Company, and pays therefor current rental charged by connecting lines in Texas.”

377. “The following is a list of stockholders and the amount of stock of the Chicago, Rock Island & Gulf Railway Company owned by each.

“(The list is not printed, as the record discloses that, except directors’ shares, the stock is held for the Chicago, Rock Island and Pacific Railway Company.)”

As further bringing this Peterson case in direct similarity to the instant case, the report of the case further shows (Page 378):

"In 1897, L. G. Hastings, then secretary of the Chicago, Rock Island & Texas Railway Company, reported to the Interstate Commerce Commission that the Chicago, Rock Island & Texas Railway Company was controlled by the Chicago, Rock Island & Pacific Railway Company, through the ownership of a majority of its bonds. In 1899 he reported it as controlled by the Pacific Company, through its ownership of a majority of its capital stock."

380. "The rails of the Chicago, Rock Island & Gulf Railway Company on the line running from Fort Worth north connect at the State line with the rails of the Chicago, Rock Island and Pacific Railway Company. The point of connection is somewhere near the middle of Red River on a bridge. At this particular point there is no town, station or turnout, and the trains going in either direction do not stop at said point. It was not possible to build a town or station at the exact point of connection."

382. "Eleven members of the board of directors of the Pacific Company are also members of the board of directors of the Rock Island Company. Five members of the executive committee of the Pacific Company are also members of the finance committee of the Rock Island Company. The officers of the Rock Island Company, with two exceptions, are also officers of the Pacific Company and a majority

of the officers of either said companies are common to both of them.

“* * * when the defendant company (Pacific Company), constructed its line of road across the Red River in 1892, the Texas Company was organized and the Pacific Company furnished the money with which the road was constructed south from Red River to Fort Worth.”

The report in the Peterson case further shows that the reports of the directors to the stockholders, the folders of the railroad companies with accompanying maps, were used to show that both roads constituted and were advertised as one system.

The point to be decided in that case was whether or not, under the above facts, the Chicago, Rock Island & *Pacific* Railway Company was doing business in the State of Texas, so that service on an officer of the Gulf Company was service on the Pacific Company. The arguments made in the Peterson case, as shown by the Supreme Court report, were the same arguments made in the present case.

However, in an elaborate opinion by Justice Day, this Court held that the two railroad companies were separate, legal entities (page 393):

“So, in the case at bar, notwithstanding the ownership of the stock in the Gulf Company by the Pacific Company, the former company transacts the business in Texas, and is a separate legal entity, authorized under the laws of Texas and legitimately carrying on business there.”

It will thus be seen that the same general facts complained of here appeared in the Peterson case, *i. e.*, stock ownership, the same officers and directors, the renting of equipment, the reports to stockholders and maps, etc. However, none of them were held to merge the one corporation into the other.

**Interstate Commerce Commission v. Stickney, et al.,
215 U. S. 98.**

The question here involved was the reasonableness of a terminal charge at Chicago of Two (\$2.00) Dollars per car on freight consigned to the Union Stock Yards, which yards were on the line of the Union Stock Yards Railway Company and the Indiana State Line Railway Company. The Interstate Commerce Commission had ordered this charge reduced to One (\$1.00) Dollar per car. The suit was for a restraining order against this reduction. The restraining order was granted in the lower Court and affirmed here. One of the points involved was that:

“The railroads have created the Union Stock Yards and made it their depot and the only available place for delivery of live stock in Chicago. It is the greatest live stock market in America and the other depots they have established are paper depots and no real terminal exists.”

In passing on the separateness of the corporation, regardless of this stock ownership, the Court said:

“The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that *most or even all* of its stock is owned by the several railroad companies entering into Chicago does not make its lines or property part of the lines or property of the separate railroad companies.”

Pullman Car v. Missouri Pacific, 115 U. S. 587, is to the same effect.

The Peterson case, *supra*, has been lately reaffirmed by this Court in

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333.

In this case it appeared that the suit was brought in North Carolina against Cudahy Packing Company, a Maine corporation. Service was had by delivering a copy to the Cudahy Packing Company of Alabama. The facts showed that the Maine corporation owned not only all of the capital stock of the Alabama corporation but further that:

“Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or de-

partments of its business not separately incorporated which are established to market the Cudahy products in other States. The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws."

Notwithstanding such ownership of stock and such absolute control and management the separate identity of the two corporations was observed and the parent corporation was held not to be doing business in the State on account of its subsidiary.

"The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. *Bank of America v. Whitney Central National Bank*, 261 U. S. 171. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the in-

strumentality for doing business therein. Compare *Lumiere v. Mae Edna Wilder, Inc.*, 261 U. S. 174, 177-8. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 409-11; *Peterson v. Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; and *People's Tobacco Co., Ltd., v. American Tobacco Co.*, 246 U. S. 79, 87. In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. Hence, cases concerning substantive rights, like *Hart Steel Company v. Railroad Supply Co.*, 244 U. S. 294; *Chicago, etc., Ry. Co. v. Minneapolis Civic Association*, 247 U. S. 490; *Gulf Oil Corp. v. Lewellyn*, 248 U. S. 71; and *United States v. Lehigh Valley R. R. Co.*, 254 U. S. 255, have no application."

The cases last cited by the Court in the *Cudahy* case, *supra*, and other cases where the Court has disregarded corporate forms will be found to be cases where the organization of the subsidiary corporation was in order to do, through the subsidiary, what the corporation could not do itself, *i. e.*, hold coal lands, collect higher rates, etc.

In the instant case it has been shown that the Kentucky corporation was organized years before there was any franchise tax on railroad corporations in Kentucky. Therefore, its organization could not have been for any ulterior motive. In fact, the Southern Railway Company of Virginia in subscribing to the stock of the Southern Railway Company in Kentucky, only did what it was expressly invited by the Kentucky Statutes to do, to wit, acquire stock in a Kentucky railway.

Kentucky Statutes 769, being part of the general statutes regulating the organization and reorganization of railroad companies provides in part as follows:

“* * * and any company organized under the laws of this or any other state may, unless prohibited by law, subscribe to the capital stock of any company organized under this law. * * *.”

We submit, therefore, that by virtue of its stock ownership in the Kentucky corporation, that corporation did not lose its separate individual entity and that the Southern Railway Company of Virginia did not thereby become the owner of any property in Kentucky or transact any business within Kentucky and therefore was not liable to taxation by the State of Kentucky.

III.

Under the Federal Statutes Regulating the Control and Operation of Railroads by the United States Railroad Administration, no Judgment could be Rendered Against the Southern Railway Company of Virginia for these Taxes.

IV.

Under the Federal Statutes Regulating the Control and Operation of Railroads by the United States Railroad Administration, the Director General was Not Liable for a Penalty.

These two points are so closely interwoven that they will be discussed together.

It will be remembered that possession of the railroads was taken December 28, 1917, as of December 31, 1917, under a proclamation of the President. An Act was subsequently passed, approved March 21, 1918, governing the conduct of this Federal Administration (40 Stat. at Large, 457), 1 Supp. Com. Stat. 1919, page 758). This Act provided, among other things, for compensation to be paid by the Government to railroads.

This compensation was to be fixed by a contract, or if not by a contract, then by partial payments during Federal control and a final settlement. The following provisions were made in regard to taxes. This is from Section 1 of the Act:

“Every such agreement shall provide that any Federal taxes under the Act of October

third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation."

Section 15 of the Act provides as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or

regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

The taxes involved are property and not excise taxes, therefore, under the plain language of the Act they are Government liabilities and not a liability of the corporation. The Commonwealth in the State Court relied upon the case of **St. Louis & San Francisco R. R. Co. v. Middlekamp**, 256 U. S. 226, as holding *contra*. Examination of that case will show that the tax there involved while denominated a "franchise" tax was in reality not a property tax as is the Kentucky "franchise" tax, but was an excise tax on the corporation's right "to be." This Missouri tax was construed by the Supreme Court of Missouri in **State, ex rel., Marquette Hotel Inv. Co. v. State Tax Commission, et al.**, 221 S. W. 721, and there defined as not a property tax but an excise tax as follows:

"WILLIAMSON, J. (After stating the facts as above.) The statute in question is denominated a franchise tax in the title and in the first section of the act. In relator's brief the first point made is that this is a 'franchise tax and not a tax upon property.' Respondent in its brief states that it 'readily agrees with relator that the franchise tax is not a property tax.' Since the law-making body and the contending parties are agreed upon this point, we think we may safely assume that this is a franchise tax, and so dispose of relator's contention No. 1."

We agree that a State would have a right to tax a railroad corporation upon that corporation's right "to be," even though the property of the railroad were in the hands of the railroad administration. This because the corporation itself was still in existence and its right "to be" was still being exercised by it although the Government had possession of its property. It is different, however, where the tax is upon the property of the corporation, which property was actually in the possession and control of the Government and which tax the Government obligated itself to pay.

In regard to the penalty, as well as the point that the taxes are a liability of the Director General and not the railroad corporation, a recent authority is that of **Missouri Pacific Railroad Co. v. Ault**, **256 U. S. 554**. This case discusses very fully the language and the construction of the Act of Congress quoted as fixing the liability for everything that occurs during Government control upon the Director General and as relieving the railroad companies from such liability. The opinion contains a discussion not only of the Act, but of Order No. 50 adopted by the Director General, and the question of the liability of the Director General for a penalty is fully dealt with. In this case it appears that a statute of Arkansas provided that whenever a railroad company discharged an employe, with or without cause, the railroad company should pay the discharged employe, the wages due him within seven days of the discharge. Further, that if payment was not made within the above time, "then as a

penalty for such non-payment, the wages of such servant or employe shall continue from the date of the discharge or refusal to further employ at the same rate until paid." In August, 1918, Ault brought suit against the railroad company, alleging that he had been employed by the company at the rate of \$2.50 per day; that he had been discharged on July 29, 1918, and that \$50.00 was then due him as wages but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court of the State and there moved in January of 1919 to substitute as the defendant the Director General of Railroads. The Court refused to make this substitution, but joined the Director General as a party defendant and rendered judgment against both the Director General and the railroad company upon a verdict that Ault recover the sum of \$50.00 due him as wages and \$390.00 as penalty. The judgment was affirmed by the Supreme Court of Arkansas. The case was taken to this Court where it was held that the judgment for the \$50.00 should have been solely against the Director General and not against the railroad. In holding that the penalty could not be imposed on the Director General, the Court said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in Section 10 to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,'

and the provision in Section 15 that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The Director General adopted a much more effective and direct method: 'Now that the railroads are in possession and control of the Government, it would be futile to impose fines for violations for said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishment for wilful and inexcusable violations thereof upon

the person or persons responsible therefor.' General Order No. 8, *Id.*, p. 167.

"The purpose for which the Government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, '*provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.*' (Our italics.) Whenever the law permitted compensatory damages they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hines v. Taylor*, 79 Florida, 218. But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines v. Taylor*, *supra*; *Jackson-Tweed Lumber Co. v. Southern Ry. Co.*, 113 S. Car. 236. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: 'It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' *Leep v. Railway Co.*, 58 Ark. 407, 440-441. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of Federal law. Whatever name be

applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous.

"The case is properly here on writ of error. The petition for writ of *certiorari*, consideration of which was postponed to the hearing on the merits, is therefore denied. Judgment reversed,"

The question was again before this Court in the case of **Norfolk-Southern R. R. Co. v. Owens**, 256 U. S. 565. The opinion is very short, and is as follows:

"This case comes here on writ of *certiorari* (251 U. S. 550) to the Supreme Court of North Carolina, which affirmed (178 N. Car. 325) a judgment of \$21.00 against the Norfolk-Southern Railroad Company in favor of Owens, a shipper. The amount was assessed under a statute of the State as a penalty for undue delay in making delivery of an intrastate shipment made March 27, 1918. At that time the railroad was in the possession and control of the Government, and was being operated by the Director General under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. The only question presented for decision is whether the company was liable for the penalty. We are of opinion that it was not, for the reasons stated in *Missouri Pacific R. R. Co. v. Ault*, decided this day, *ante*, 554."

That this twenty per cent is a penalty appears from the statute itself—4241 Ky. Stat. Thus it is said in this statute:

“All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof.”

The Court of Appeals of Kentucky has definitely held that the twenty per cent is a penalty.

Bank of Kentucky v. Commonwealth, 107 S. W. 812, 32 Ky. L. R. 1087.

“The penalty of 20 per cent is given by the statute on the amount of the taxes due. A 20 per cent penalty on the taxes and interest is not allowed. The agent filing the statement is entitled to the penalty of 20 per cent. He gets this in all cases whether long or short. He takes the bad with the good. What the taxpayer owes is the taxes. A penalty of 20 per cent is added for his delinquency, and under the rule above referred to, the taxes in cases like this bear interest at 6 per cent where the collection of the money is prevented by the taxpayer by legal proceedings; but we know of no principle justifying us in adding interest to the penalty. The rule is that penalties do not bear interest, and it seems to us it would be a harsh rule to add a penalty of 20 per cent to the taxes and then make both penalty and taxes bear interest at 6 per cent. This would be to make the cost of legal proceedings to test the legality of assessments oppressive, when unsuccessful, and such an additional penalty for delay cannot be enforced without

statutory authority. If the penalty as well as the taxes went to the State, it would hardly be maintained in the absence of a statute that the penalty of 20 per cent should be added to the taxes and that after this both the penalty and the taxes should bear interest at 6 per cent. The fact that the State pays its agent by giving him the penalty adds nothing to the penalty. The liability of the taxpayer is not affected by the way the State pays its officer.

“We therefore conclude the appellant must pay interest on the taxes, but not on the penalty.”

It is submitted therefore that no judgments could have been rendered for these taxes against the plaintiff-in-error, Southern Railway Company of Virginia, and no penalty could have been assessed against the Director General under the Acts of Congress concerning the taking and operation of railroads by the Government or under the cases from this Court construing such acts.

WHEREFORE, we ask that the judgment of the State Court be reversed.

Respectfully submitted,

L. E. JEFFRIES,

ALEX P. HUMPHREY,

EDWARD P. HUMPHREY,

CHARLES W. MILNER.

Counsel for Plaintiffs-in-Error.

APPENDIX.

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.

Including C. N. O. & T. P. Rwy. Co.

YEAR ENDED DEC. 31, 1918.

Net Railway Operating Income Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads.	\$ 32,969,380.58
Net Railway Operating Income C. N. O. & T. P.	3,047,946.55
Total.	\$ 36,017,327.13
Capitalized at 7%	\$514,533,244.71
Deduct:	
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	\$80,160,065.06
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks C. N. O. & T. P.	2,046,735.53
Total Outside Excess Tangible Values.	82,206,800.59
Deduct Total Tangible Outside Values, we have.	\$432,326,444.12
Entire Mileage, Southern Ry. Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads.	9,601.83
Entire Mileage, C. N. O. & T. P.	337.27
	9,939.10
Ky. Mileage, Southern Ry. Co., Kentucky, M. & O., Cumberland R. R., and Cum- berland Ry.	227.11
Ky. Mileage, C. N. O. & T. P.	197.50
	424.61
Proportion Ky. to Total Mileage 4.273%—4.273% of \$432,326,444.12 gives total value in Kentucky.	18,473,308.96
Equalized at 85%	15,702,312.62
Values heretofore paid on tangible and in- tangible property in Ky. by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,500,512
Values heretofore paid on tangible and in- tangible property in Ky. by C. N. O. & T. P.	9,173,208
	12,673,720.00
Omitted value Southern Railway Co., Vir- ginia, franchise in Kentucky.	3,028,592.62

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
Including C. N. O. & T. P. Rwy. Co.

YEAR ENDED JUNE 30, 1917.

Net Railway Operating Income Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads.	\$ 31,806,408.49
Net Railway Operating Income C. N. O. & T. P.	4,970,326.01
Total.	\$ 36,776,734.50
Capitalized at 7%	525,381,921.43
Deduct:	
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks of Southern Railway Com- pany, Virginia, and Owned, Oper- ated, Leased and Controlled Roads.	\$67,832,331.71
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks C. N. O. & T. P.	1,019,582.15
Total Outside Excess Tangible Values.	68,851,913.86
Deduct Total Tangible Outside Values, we have.	\$456,530,007.57
Entire Mileage, Southern Ry. Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads.	9,761.36
Entire Mileage, C. N. O. & T. P.	337.27
	10,098.63
Ky. Mileage, Southern Ry. Co., Kentucky, M. & O., Cumberland R. R., and Cum- berland Ry.	227.14
Ky. Mileage, C. N. O. & T. P.	197.50
	424.64
Proportion Ky. to Total Mileage 4.209%—4.209% of \$456,530,007.57 gives total value in Kentucky.	19,215,348.02
Equalized at 75%	14,411,511.02
Values heretofore paid on tangible and in- tangible property in Ky. by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,500,053
Values heretofore paid on tangible and in- tangible property in Ky. by C. N. O. & T. P.	9,181,368
	12,681,421.00
Omitted value Southern Railway Co., Vir- ginia, franchise in Kentucky.	\$1,730,090.02

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1916.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	\$ 25,519,430.81
Capitalized at 6%, we have.	425,323,846.83
Deduct Total Outside Excess Tangible Values; <i>i. e.</i> , shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	55,260,111.19
	<hr/>
	\$370,063,735.64
Entire Mileage, Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	9,522.79
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway.	227.14
Proportion Ky. to total mileage 2.385%—2.385% of \$370,063,735.64.	8,826,020.10
Equalized at 60%.	5,295,612.06
Values heretofore paid on tangible and intangible property in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.. . . .	3,277,051.00
	<hr/>
Omitted value Southern Railway Co., Virginia, franchise in Ky.	\$2,018,561.06

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1915.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	\$ 15,880,419.66
Capitalized at 6%, we have.....	264,673,661.00
Deduct Total Outside Excess Tangible Values; i. e., shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.....	49,639,400.79
	<hr/>
	\$215,034,260.21
Entire Mileage, Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	9,523.15
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway.	226.91
Proportion Ky. to total mileage 2.382%—2.382% of \$215,034,260.21.	5,122,116.08
Equalized at 60%.....	3,073,269.65
Values heretofore paid on tangible and intangible property in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry..	3,237,451.00
	<hr/>
Overpayment.	\$164,181.35

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1914.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads.	\$ 19,066,908.92
Capitalized at 6%, we have.	317,781,815.33
Deduct Total Outside Excess Tangible Values; <i>i. e.</i> , shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads.	43,699,232.53
	<hr/>
	\$274,082,582.80
Entire Mileage, Southern Railway Co., Vir- ginia, and Owned, Operated, Leased and Controlled Roads.	9,395.82
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway.	226.91
Proportion Ky. to total mileage 2.416%—2.416% of \$274,082,582.80 gives total Kentucky value.	6,621,835.20
Equalized at 60%.	3,973,101.12
Values heretofore paid on tangible and intangible prop- erty in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,000,439.00
	<hr/>
Omitted value Southern Railway Co., Vir- ginia, franchise in Ky.	\$972,662.12

KENTUCKY STATUTES, 4077-81.

Section 4077. (1) Franchise; assessment of.— Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in §1 (4095) of subdivision 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other

duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the attorney general, when requested by the board of valuation and assessment, to attend said board at its meetings and advise with same in its proceedings.

Section 4078. Corporations to report to auditor to determine value of franchise.—In order to determine the value of the franchises mentioned in the next preceding section (each of said corporations) shall annually, between the (thirtieth day of June and the first day of October), make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the (thirtieth day of June of the year in which the statement is required to be made); the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including

interest on investments, and incomes from all other sources for twelve months next preceding the (thirtieth day of June of the year in which the statement is required); the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require. (March 15, 1916, c. 22, p. 88, art. IV., subd. I, §2, as amd. March 29, 1918, c. 128, p. 554.)

Section 4078a. Time for filing above reports; period of time covered; dates may be changed, when.—That the annual report or statement of every railway company or railway corporation, telephone, telegraph, express company or other public utility company now required under the provisions of the Kentucky statutes to be made and delivered to the auditor of public accounts, tax commission or railroad commission, between the 30th day of June and the 1st day of October, hereafter shall be made and delivered by every such company or corporation to the auditor of public accounts, the tax commission and the railroad commission between the 31st day of December and the 31st day of March following, and the information therein furnished as called for by the statutory provisions aforesaid shall cover the period of twelve months ending the 31st day of December, instead of the 30th day of June, as heretofore required; provided, however, the aforesaid state departments are hereby authorized and directed to

change the date of the aforesaid reports to conform to any change in date established by federal regulations. (March 29, 1918, c. 128, p. 554.)

Section 4079. (3) Value of franchise; how determined; lines extend beyond state or county.—Where the line or lines of any such corporation, company or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this state, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other state or government or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this state and out of this state, on business done in this state, and the entire gross receipts of the corporation, company or association in this state and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said board may excuse the officer from answering such questions:

Provided, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

Section 4080. (4) Foreign corporations; franchise; how determined.—If the corporation, company or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the capital stock in this state by capitalizing the net income derived in this state, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere, the proportion which the gross receipts of this state, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this state, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the cor-

porate franchise of such corporation, company or association for taxation in this state.

Section 4081. (5) Interstate carrier; franchise; how fixed.—If the corporation organized under the laws of this state, or of some other state government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company or a corporation performing any other public service, the lines of which extend beyond the limits of the state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this state; but if any such railroad or other corporation organized under the laws of this state have all of its lines outside of this state, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this state for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned shall be the value of its intangible

property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this state and in the county, city, town and district where its principal place of business in this state may be located.

Office Supreme Court, U. S.


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Supreme Court of the United States

OCTOBER TERM, 1924.

Nos.  218 & 219

JAMES C. DAVIS, Director General,
as Agent, - - - - - Plaintiff-in-Error,

vs.

COMMONWEALTH OF KENTUCKY,
By, &c., - - - - - Defendant-in-Error.

SOUTHERN RAILWAY COMPANY, - Plaintiff-in-Error,

vs.

COMMONWEALTH OF KENTUCKY,
By, &c., - - - - - Defendant-in-Error.

REPLY BRIEF FOR PLAINTIFFS-IN-ERROR.

L. E. JEFFRIES,
ALEX P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Counsel for Plaintiffs-in-Error.



Supreme Court of the United States

OCTOBER TERM, 1924.

Nos. 758 and 759.

JAMES C. DAVIS, DIRECTOR GENERAL,
AS AGENT, - - - - *Plaintiff-in-Error,*

v.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - *Defendant-in-Error.*

SOUTHERN RAILWAY COMPANY, - *Plaintiff-in-Error,*

v.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - *Defendant-in-Error.*

REPLY BRIEF FOR PLAINTIFFS-IN-ERROR.

In the interest of brevity we will, in this reply brief, simply call attention to a few of the more outstanding errors in the brief for defendants-in-error.

I.

In our original brief at page 19 and at pages 83 to 87 inclusive we detailed to the Court the exact calculation on which the additional tax assessments were made. These calculations were authentic and correct. However, at page 17 of the defendant-in-error's brief the following statement is made:

"It does not appear what method the court used or what deductions it made or how it reached the result indicated. The Court is asked to speculate * * *."

This is not a correct nor a frank statement as can be shown.

First. The record, pages 145 and 146, show that the judgment of the State Circuit Court made the following additional assessments:

1915	\$ 972,662.00
1916	None.
1917	2,018,561.00
1918	1,730,090.00
1919	3,028,592.00

It is apparent that the above amounts of the judgment were in dollars only, *i. e.*, no cents were included.

In our brief, page 19, and pages 83 to 87 inclusive, there is set out in detail the exact method of calculation used by the State Court in arriving at the above assessments. Examination of the rec-

ord discloses that the amounts shown by the calculations differ from the judgment only as to the cents—thus the calculation for the year ending 1918, is only 62¢ more than the judgment; for 1917, only 2¢ more than the judgment; for 1916, only 6¢ more than the judgment; 1915 shows an overpayment; for 1914, only 12¢ more than the judgment.

We submit that this identity of figures can not be the result of a mere coincidence and that the calculations demonstrate the exact method used by the Court in making the assessments.

Second. Each figure used in the calculations comes from either the stipulations or the undenied pleadings.

We take as an example the calculations for the last year involved, to wit: the result of operations for the year 1918, on which the 1919 taxes were based. This calculation is at pages 19 and 83 of our original brief and for ready reference is as follows:

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.

Including C. N. O. & T. P. Rwy. Co.

 YEAR ENDED DEC. 31, 1918, ON WHICH 1919 ASSESSMENT
WAS BASED.

Net Railway Operating Income Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	\$ 32,969,380.58
Net Railway Operating Income C. N. O. & T. P.....	3,047,946.55
Total	\$ 36,017,327.13
Capitalized at 7%	\$514,533,244.71
Deduct:	
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads....	\$80,160,065.06
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks C. N. O. & T. P.....	2,046,735.53
Total Outside Excess Tangible Values.....	82,206,800.59
Deduct Total Tangible Outside Values, we have.....	\$432,326,444.12
Entire Mileage, Southern Ry. Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	9,601.83
Entire Mileage, C. N. O. & T. P.....	337.27
	9,939.10
Ky. Mileage, Southern Ry. Co., Kentucky, M. & O., Cumberland R. R., and Cum- berland Ry.	227.11
Ky. Mileage, C. N. O. & T. P.....	197.50
	424.61
Proportion Ky. to Total Mileage 4.273%—4.273% of \$432,326,444.12 gives total value in Kentucky.....	18,473,308.96
Equalized at 85%	15,702,312.62
Values heretofore paid on tangible and in- tangible property in Ky. by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.....	3,500,512
Values heretofore paid on tangible and in- tangible property in Ky. by C. N. O. & T. P.	9,173,208
	12,673,720.00
Omitted value Southern Railway Co., Vir- ginia, franchise in Kentucky.....	3,028,592.62

It will be observed that the principal figures used in the above calculation are as follows:

The total net railway operating income of the Southern of Virginia, and its owned, operated, leased and controlled roads, and of the C. N. O. & T. P.....	\$36,017,327.13
Total outside excess tangible values of the Southern of Virginia	80,160,065.06
Total outside excess tangible values of the C. N. O. & T. P.	2,046,735.53
The proportion of Kentucky to total mileage was	4.273%
Values heretofore paid on in Kentucky by the Southern in Kentucky, etc.	\$3,500,512.00
Values heretofore paid on in Kentucky by C. N. O. & T. P.	9,173,208.00

Now compare the above figures with the following undenied allegations of the amended answer of the Southern Railway Company of Virginia and James C. Davis, Director General, filed May 20, 1922 (Record, pp. 139, 140 and 141):

"Defendants, Southern Railway Company and James C. Davis, Director General of Railroads, and each of them say that for the year ending December 31, 1918, the railway operating income of this defendant and of the C. N. O. & T. P. Ry. Co. was **\$36,017,327.13**; that the proportion of the mileage in Kentucky of the Southern Railway Company in Kentucky and the other railroads in Kentucky mentioned in the petition herein and including the mileage in Kentucky of the C. N. O. & T. P. Ry. Co. to the total mileage of the lines owned, operated, leased and controlled by the defendants including the mileage of the C. N. O. & T. P. Ry. Co. was **4.273%**; that for the said period the defendant, Southern Railway Company had on its lines outside of Kentucky double track, shops,

terminals, etc., of the value of **\$80,160,065.06**; that none of the roads mentioned in the plaintiff's petition in Kentucky had any such double tracks, shops, terminals, etc. The Cincinnati, New Orleans & Texas Pacific Railway Company had outside of Kentucky double tracks, shops, terminals, etc., of the excess value of **\$2,046,735.53**, over and above the value of any double tracks, shops or terminals inside of the State of Kentucky. * * * that for said period the said C. N. O. & T. P. Ry. Co. paid to the State of Kentucky a franchise tax on a franchise valuation of **\$9,173,208.00**, and that the other roads in Kentucky mentioned in the petition paid taxes on a franchise valuation of **\$3,500,512.00."**

As stated, none of the above allegations were denied.

It will be observed further from the above calculation that the net railway operating income was capitalized at 7%. It was expressly alleged in our original answer (Record, pp. 57-61):

"Further answering, these defendants say that for the taxing years 1918 and 1919, dealt with in the Statement herein, the assessing authorities of the State of Kentucky—The State Tax Commission—have uniformly established and acted upon a rule of ascertaining the value of the franchise of railroad companies subject to assessments in Kentucky, which was applied to all of said railroads. This rule was to ascertain the net earnings of the said railroad company, taxes being deducted, and then to capitalize these net earnings at **7 per cent** * * *."

This allegation was not denied.

Also it will be observed from the above calculation that the taxes were equalized at 85 per cent. Stipulation No. 5, Record, p. 144, is in part as follows:

“But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at **75%** and for 1918 **85%.**”

We might go into further detail to show that each and every figure used in the above calculation and in all of the other calculations for each of the other years, comes direct from either the undenied pleadings or express stipulations, but believe that the above is sufficient to show that the calculations given by us are direct from the record, were the calculations used by the Court and are the only figures in the record on which the assessment could have been made.

For the convenience of the Court and to correct the erroneous statement of defendant-in-error, we have attached as an appendix to this brief, the calculation for each of the years showing in detail where the figures used, appear in the record.

We submit that the record does affirmatively show the method used by the State Court in making the additional assessments and that the record further affirmatively shows that no other figures could have been or were used.

II.

The statement is made at page 14 that:

“The railroad company in neither of the Kentucky courts made the objection which is made here that this was to tax property outside of the state.”

This statement can not possibly be reconciled with the following allegation of the original answer (Record, p. 13 at p. 20 with reference to the first three years, and at pp. 57-63 for the last two years):

“Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky, for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of the Constitution of the State of Kentucky, and to the Constitution of the United States, particularly the Fourteenth Amendment thereof.”

Nor can the above statement from the brief of defendant-in-error be reconciled with the following from the first opinion of the Court of Appeals (Record, p. 118 at p. 128):

“But it is insisted that this would result in taxing in Kentucky property having no situs here. A sufficient answer to this is that * * *.”

In its first opinion (Record, p. 128), the Kentucky Court of Appeals decided that:

"It is our conclusion, therefore, that the Court should have assessed against defendant (Southern Railway Company of Virginia), Kentucky's portion of its intangible property assessed by the proposition of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the Statute * * *."

There is in Kentucky a rule of law to the effect that the opinion on the first appeal, whether right or wrong, is binding, not only on the lower court, but on the Appellate Court on the second appeal. The rule is thus stated in **Hopkins v. Adam Roth Grocery Co., 105 Ky. 357:**

"The legal principles determined on the first appeal of a case are not merely precedents for the guidance of this court on a second appeal of the same case. But the law as first determined—right or wrong—is the law of the case, and must control, not only the lower court upon a return of the case, but also this court in any subsequent appeal. Opinion of appellate Court on first appeal can not be revised in the same cause upon a second appeal."

In this Hopkins case the Court conceded that its prior opinion was wrong, but held that it was powerless to change it:

358. "Under the authority referred to, we are powerless to disturb the judgment, and it is therefore affirmed."

Therefore, the point was expressly raised in the original pleadings and raised again in our original brief in the Kentucky Court of Appeals that the proposed additional tax was a tax on property, values and earnings wholly outside of Kentucky and therefore unconstitutional. The Court of Appeals in its first opinion decided that point against us and held that the tax should be assessed against the defendant, Southern Railway Company of Virginia, according to the proportion of the mileage that the lines nominally operated by the Southern Railway in Kentucky bore to the entire mileage of defendant's system. Under these circumstances and since this opinion was binding not only on the lower court but on the Court of Appeals on any subsequent appeal, it would have been useless and futile to re-argue that question.

Such failure, however, to re-argue the question can not be tortured into any acquiescence or agreement on our part.

The Court of Appeals itself, in its second opinion (Record, p. 153), recognized that there was no acquiescence but that the second appeal for the years 1917 and 1918, was concluded by the former opinion as follows:

"But it is admitted that the assessments for 1917 and 1918 were made in accordance with

and are concluded by the former opinion herein."

There was, therefore, not even a scintilla of agreement or acquiescence in the judgment or assessments, and any statement or insinuation to that effect is without foundation.

III.

An argument hitherto unheard of is made at page 17 of defendant's brief to the effect that:

"If a car of freight is shipped from Louisville to New Orleans and the rate is \$5.00 to Danville, Kentucky, and \$100.00 from Danville to New Orleans, what the Louisville line brings in is not \$5.00 but \$105.00. The same thing is true of shipments from the far south to Louisville * * *."

This would seem to argue that whenever a car of freight originates or ends in Kentucky that Kentucky is entitled to capitalize the entire earnings of that car regardless of the fact that ten other States might also be traversed by the particular car, or that the mileage outside of Kentucky might be ten times as great as the mileage in Kentucky. The fallacy of this argument is apparent when it is recalled that each State has the right to capitalize its own part of the earnings of the car, and Kentucky has no more right to capitalize the entire earnings than would each of the other ten States

also have the right to capitalize the entire earnings.

In the figures given of the net income of the line in Kentucky, there has been included the entire income earned in Kentucky, *i. e.*, all of the local business originating and ending in Kentucky as well as all of the through business which the line in Kentucky received on account of its alleged system connection.

IV.

The argument is made in defendant's brief at page 18, that although the railroads for the years involved were under the control of and being operated by the United States Government as its property, that the assessment against the corporation itself was justified because only by having a judgment against the corporation could the State be secure in its debt.

This proposition is based on the novel claim that the United States Government might repudiate its obligation and that because of the fear of such repudiation the Court should attach a liability on one who was not liable therefor.

We submit that such an argument can not be seriously intended or considered, and further that a liability will not be attached against an innocent party solely because the principal debtor might repudiate the obligation.

The lien statute referred to in defendant's brief was of course never intended to cover a situation where in the emergency of war the Government under its broad war powers took the physical property of all railroads from the owners and operated same as a part and parcel of the Government itself.

Furthermore, this Court has already decided that a railroad corporation was not itself liable for any of the debts or obligations growing out of the control and operation of its railroad property by the Director General.

Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554.

A joint judgment was rendered against both the railroad corporation and the Director General for a certain sum owed Ault for services and for a further sum as penalty. This Court held that the railroad corporation was not liable either at common law or under the Federal Control Act upon any cause of action arising out of the operation of its railroad by the Government through the Director General of Railroads.

557. "The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through 'one control, one administration, one power for the accomplishment of the one

purpose, the complete possession by governmental authority, to replace for the period provided the private ownership theretofore existing.' *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 148. This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing Proclamation of March 29, 1918, 40 Stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' U. S. R. R. Adm., Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, Sec. 5; 198, et seq.; 330 et seq. It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended.

"The contention that the company is liable for acts or omissions of the Director General in operating the Missouri Pacific Railroad rests wholly upon the following provision of Sec. 10 of the Federal Control Act. * * *

"It is urged, that, since Sec. 10, in terms, continues the liability of 'carriers while under Federal control' and permits suit against

them, it should be construed as subjecting the companies to liability for acts or omissions of the Railroad Administration although they are deprived of all power over the properties and the personnel. And it is said that this construction would not result in hardship upon the companies since the just compensation provided by the act would include any loss from judgments of this sort. Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408. There is none such here.

“The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was anal-

ogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

“This purpose Congress accomplished by providing that ‘carriers while under federal control’ should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term ‘carriers’ was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in Sec. 1 declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such. Bull. No. 4, p. 113. Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, *id.* p. 170. Each federal treasurer was to deal with the finances of a single system; his bank account was to be designated. ‘(Name of Railroad), Federal Account.’ General Order No. 37, *id.* p. 313. Each of 165

systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, id. pp. 198, 200. And throughout the orders and circulars there are many such expressions as 'two or more railroads or boat lines under federal control.' See General Order No. 11, id. p. 170. It is this conception of a transportation system as an entity which dominates Sec. 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it were the Government. * * *

"As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending was within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed."

In this Ault case the Court also held that the Director General was not liable for a penalty.

It has been shown in our original brief (p. 12), that the tax here in question is not an excise tax on

the corporation's right "to be," but is a tax on the intangible property of the corporation and that the Government of the United States obligated itself to pay such taxes.

It has been shown further in our original brief (pp. 81 and 82), that the twenty per cent penalty imposed by the State Court is defined as a penalty by the Statute authorizing it and has been so defined by the Court of Appeals in construing the statute.

V.

It is argued, pp. 19 and 20 of defendant's brief, that the question of the liability of the railroad corporation for the taxes and the liability of the Director General for the penalty were first raised in a petition for rehearing. This statement is not borne out by the record. These Federal questions were presented in the original answer of the Railroad and the Director General (Record, pp. 57-61), as follows:

"The defendants, Southern Railroad Company and John Barton Payne, Director General of Railroads, acting as agent under Section 206 of the Transportation Act of 1920, answering the statement filed herein, state that under the Acts of Congress duly passed the Government of the United States took and held possession of and operated for the whole of the years 1918 and 1919, all of the railroads and railroad property owned, operated, leased or controlled by the Southern Railroad Company. * * *

"Defendants state that the Director General operated each of said four railroads (i. e., Southern Railway in Kentucky, Cumberland Railroad, Cumberland Railway and Mobile & Ohio Railroad), under the franchises of the respective roads, and a report was filed on behalf of the Director General for each of said roads, with the proper authorities of the State of Kentucky."

In other words, the defendants raised these Federal questions at the inception of the suit by alleging that during the years involved the railroad properties had been under Act of Congress taken over by the Government and were being operated by the Director General of Railroads. Thus every fact or issue which flowed from such taking and operation of the railroad properties by the Government was raised by the defendants and presented to the Court, and there was also raised by the defendants and presented to the Court the Federal Statutes under which the Government took and operated the properties.

Without going into further errors in the brief for defendants-in-error, we submit as in our original brief that the judgment of the State Court should be reversed.

Respectfully submitted,

L. E. JEFFRIES,
ALEX P. HUMPHREY,
EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Counsel for Plaintiffs-in-Error.

APPENDIX.

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.

Including C. N. O. & T. P. Rwy. Co.

YEAR ENDING DEC. 31, 1918, ON WHICH 1919 ASSESSMENT
WAS BASED.

Net Railway Operating Income Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	\$ 32,969,380.58	(Stipulation 14, Rec., p. 81)
Net Railway Operating Income C. N. O. & T. P.	3,047,946.55	

Total	*\$ 36,017,327.13
Capitalized at 7%†	\$514,533,244.71

Deduct:

Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads....	\$80,160,065.06*	(Stipulation 4, Rec., p. 144)
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Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks C. N. O. & T. P.	2,046,735.53*	(Stipulation 2, Rec., p. 143)
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Total Outside Excess Tangible Values.....	82,206,800.59
---	---------------

Deduct Total Tangible Outside Values, we have.....	\$432,326,444.12
--	------------------

Entire Mileage, Southern Ry. Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	9,601.83	(Stipulation 16, Rec., p. 81)
Entire Mileage, C. N. O. & T. P.	337.27	(Stipulation 2, Rec., p. 143)

9,939.10

Ky. Mileage, Southern Ry. Co., Kentucky, M. & O., Cumberland R. R., and Cum- berland Ry.	227.11	
Ky. Mileage, C. N. O. & T. P.	197.50	(Stipulation 2, Rec., p. 143)

424.61

Proportion Ky. to Total Mileage 4.273%*—4.273% of \$432,326,444.12 gives total value in Kentucky.....	18,473,308.96
Equalized at 85%†	15,702,312.62

Values heretofore paid on tangible and in- tangible property in Ky. by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,500,512*
--	------------

Values heretofore paid on tangible and in- tangible property in Ky. by C. N. O. & T. P.	9,173,208*	12,673,720.00
--	------------	---------------

Omitted value Southern Railway Co., Vir- ginia, franchise in Kentucky.....	3,028,592.62
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*Figures of Total Net Income	\$36,017,327.13
Southern Railway Outside excess Tangible Values..	80,160,065.06
C. N. O. & T. P. Outside excess Tangible Values....	2,046,735.53
Percentage of Kentucky to Total Mileage	4.273%
Values heretofore paid on by Southern Railway Com- pany in Kentucky, Cumberland Railroad, Cum- berland Railway and M. & O.	3,500,512.00
Values heretofore paid on C. N. O. & T. P.	9,173,208.00
Each and all are in undenied allegations of Amended Answer filed May 20, 1922—Record, pp. 139-140-141.	

†7% Capitalization—Undenied Allegation, Original Answer, Record,
pp. 57-61.

†Plus 85% Equalization figure—Stipulation 5, Record, 144.

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
Including C. N. O. & T. P. Rwy. Co.

YEAR ENDED JUNE 30, 1917, ON WHICH 1918 ASSESSMENT
WAS BASED.

Net Railway Operating Income Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	\$ 31,806,408.49	(Stipulation 14, Rec., p. 81)
Net Railway Operating Income C. N. O. & T. P.	4,970,326.01	
Total	* \$ 36,776,734.50	
Capitalized at 7%†	525,381,921.43	
Deduct:		
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks of Southern Railway Com- pany, Virginia, and Owned, Oper- ated, Leased and Controlled Roads	\$67,832,331.71*	
Total Outside Excess Tangible Values; i. e., shops, terminals, and double tracks C. N. O. & T. P.	1,019,582.15*	(Stipulation 2, Rec., p. 143)
Total Outside Excess Tangible Values	68,851,913.86	
Deduct Total Tangible Outside Values, we have	\$456,530,007.57	
Entire Mileage, Southern Ry. Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	9,761.36	(Stipulation 16, Rec., p. 81)
Entire Mileage, C. N. O. & T. P.	337.27	(Stipulation 2, Rec., p. 143)
	10,098.63	
Ky. Mileage, Southern Ry. Co., Kentucky, M. & O., Cumberland R. R., and Cum- berland Ry.	227.14	
Ky. Mileage, C. N. O. & T. P.	197.50	(Stipulation 2, Rec., p. 143)
	424.64	
Proportion Ky. to Total Mileage 4.209%*—4.209% of \$456,530,007.57 gives total value in Kentucky.....	19,215,348.02	
Equalized at 75%‡	14,411,511.02	
Values heretofore paid on tangible and in- tangible property in Ky. by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry.	3,500,053*	
Values heretofore paid on tangible and in- tangible property in Ky. by C. N. O. & T. P.	9,181,368*	12,681,421.00
Omitted value Southern Railway Co., Vir- ginia, franchise in Kentucky	\$1,730,090.02	
Figures of Total Net Income	\$36,776,734.50	
Southern Railway Outside Excess Tangible Values..	67,832,331.71	
C. N. O. & T. P. Outside Excess Tangible Values....	1,019,582.15	
Percentage Kentucky to Total Mileage	4.209%	
Values heretofore paid on by Southern Railway Com- pany in Kentucky, Cumberland Railroad, Cum- berland Railway and M. & O.	\$3,500,053.00	
Values heretofore paid on by C. N. O. & T. P.	9,181,368.00	
Each and all are in undenied allegations of Amended Answer filed May 20, 1922—Record, pp. 139, 140, 141.		
% capitalization—undenied allegation, Original Answer, Record, pp. 57-61.		
Plus 75% equalization figure—Stipulation 5, Record, 144.		

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1916.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	\$ 25,519,430.81	(Stipulation 14, Rec., p. 39)
Capitalized at 6%,* we have	425,323,846.83	
Deduct Total Outside Excess Tangible Values; i. e., shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	55,260,111.19	(Stipulation 10, Rec., p. 138)
	<u>\$370,063,735.64</u>	
Entire Mileage, Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	9,522.79	(Stipulation 16, Rec., p. 40)
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway	227.14	{ (Stipulation 15, Rec., p. 39) (Amend. Ans., R., pp. 131-134)
Proportion Ky. to total mileage 2.385%—2,385% of \$370,063,735.64	8,826,020.10	
Equalized at 60%†	5,295,612.06	
Values heretofore paid on tangible and intangible property in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry..	3,277,051.00	(Allegation in Petition, Rec., p. 10)
Omitted value Southern Railway Co., Virginia, franchise in Ky.....	<u>\$2,018,561.06</u>	

*6% Capitalization Figure from Undenied Allegation of Original Answer, Record, pp. 18-19.

†60% Equalization Figure—Stipulation 18, Record, p. 40.

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1915.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	\$ 15,880,419.66	(Stipulation 14, Rec., p. 39)
Capitalized at 6%,* we have	264,673,661.00	
Deduct Total Outside Excess Tangible Values; i. e., shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	49,639,400.79	(Stipulation 10, Rec., p. 138)
	<u>\$215,034,260.21</u>	
Entire Mileage, Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	9,523.15	(Stipulation 16, Rec., p. 40)
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway	226.91	{ (Stipulation 15, Rec., p. 39) (Amend. Ans., R., pp. 131-134)
Proportion Ky. to total mileage 2.382%—2.382% of \$215,034,260.21	5,122,116.08	
Equalized at 60%†	3,073,269.65	
Values heretofore paid on tangible and intangible property in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry..	3,237,451.00	(Allegation in Petition, Rec., p. 7)
Overpayment	<u>\$164,181.35</u>	

6% Capitalization Figure from Undenied Allegation of Original Answer, Record, pp. 18-19.

60% Equalization Figure—Stipulation 18, Record, p. 40.

SOUTHERN RAILWAY COMPANY—WOODFORD COUNTY TAX.
YEAR ENDED JUNE 30, 1914.

Net Railway Operating Income—Southern Railway Co., Virginia, and Owned, Operated, Leased and Con- trolled Roads	\$ 19,066,908.92	(Stipulation
Capitalized at 6%,* we have	317,781,815.33	Rec., p. 3
Deduct Total Outside Excess Tangible Values; i. e., shops, terminals and double tracks of Southern Railway Co., Virginia, and Owned, Operated, Leased and Controlled Roads	43,699,232.53	(Stipulation Rec., p. 1
	<u>\$274,082,582.80</u>	
Entire Mileage, Southern Railway Co., Vir- ginia, and Owned, Operated, Leased and Controlled Roads	9,395.82	(Stipulation 16, Rec., p. 4
Kentucky Mileage, Southern Railway Co., Kentucky, M. & O., Cumberland R. R. and Cumberland Railway	226.91	} (Stipulation 15, Rec., p. 3 (Amend. Ans., R., pp. 131
Proportion Ky. to total mileage 2.416%—2.416% of \$274,082,582.80 gives total Kentucky value.....	6,621,835.20	
Equalized at 60%†	3,973,101.12	
Values heretofore paid on tangible and intangible prop- erty in Kentucky by Southern Ry. Co. in Ky., M. & O., Cumberland R. R. and Cumberland Ry..	3,000,439.00	(Allegation Petition, p. 4)
Omitted value Southern Railway Co., Vir- ginia, franchise in Ky.....	<u>\$972,662.12</u>	

*6% Capitalization Figure from Undenied Allegation of Original Answer, Record, pp. 18-19.

†60% Equalization Figure—Stipulation 18, Record, p. 40.

218 219

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JAN 5 1925

WM. B. STANBURY

Supreme Court of the United States

OCTOBER TERM, 1924. 1925

James C. Davis, Director General,
as Agent, - - - - - Plaintiff in Error,

vs.

Commonwealth of Kentucky,
By, &c., - - - - - Defendant in Error

Southern Railway Company, - - - Plaintiff in Error,

vs.

Commonwealth of Kentucky,
By, &c., - - - - - Defendant in Error

RESPONSE TO PETITION FOR CERTIORARI.

J. P. HOBSON,
For Defendants in Error.

FRANK E. DAUGHERTY, Attorney General,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES C. DAVIS, DIRECTOR GENERAL,
AS AGENT, *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., *Defendant in Error.*

SOUTHERN RAILWAY COMPANY, . . . *Plaintiff in Error.*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., *Defendant in Error.*

RESPONSE TO PETITION FOR CERTIORARI.

Defendant in error earnestly submits that the application for a certiorari is without merit and that the petition should be denied.

By statute in Kentucky the intangible property of a railroad corporation having lines in and out of Kentucky, is like other property subject to an ad valorem tax. The assessment is made by ascertaining the total value of all its property, and apportioning to Kentucky the proportion which the length of lines in Kentucky

bears to the total of all its lines. From this is subtracted the assessed value of the tangible property in Kentucky; the balance is subject to assessment. *Louisville & C. R. Co. v. Greene*, 244 U. S. 522.

The question presented is: Can a corporation in fact owning and controlling property in Kentucky evade its just taxes by a mere form?

The facts are well stated by the Court of Appeals as follows:

"The Commonwealth of Kentucky on relation of Robert Hawkins, sheriff of Woodford County, filed two statements in the county court of that county under the authority given by section 4241 of the statutes, by which it was sought to list for taxation, as omitted property for the years 1914-1918, both inclusive, the intangible property of defendant, Southern Railway Company, that its alleged owned and controlled lines in Kentucky bore to its owned and controlled lines constituting its entire railway system. The statement seeking the relief for the years 1914, 1915, and 1916 was filed against Southern Railway Company alone, and the one seeking the same relief for the years 1917 and 1918 joined with the company the Director General of Railroads, who for those two years operated defendant's railway system under the Federal Control act. The facts governing the right to assess the property for each of the years are the same, and the two statements were heard and disposed of in the courts below as one case. In each statement it was averred in substance that defendant, Southern Railway Company, which is a Virginia corporation, owned, operated, and controlled, in round numbers, one hundred and twenty-seven (127) miles of railroad in Kentucky, running from the city of Louisville, in Jefferson County, to Danville, in Boyle County, with branches running to Versailles, Georgetown, Lexington, and perhaps other points, but which were ostensibly owned and operated by a Kentucky corporation known as "Southern Railway Company in

Kentucky." That it so owned, operated and controlled thirty-eight and a fraction miles of railroad trackage in Kentucky ostensibly owned and operated by the Mobile and Ohio Railroad Company; That it likewise owned, operated and controlled one and three-fourths ($1\frac{3}{4}$) miles of railroad in Bell County, ostensibly operated in the name of the Cumberland Railway Company, and also owned, operated and controlled 12.9 miles of railroad in Knox County, Kentucky, ostensibly owned and operated by the Cumberland Railroad Company; and that defendant entirely omitted to make any report to the Auditor of Public Accounts of the State for either of the four years involved as is required by the provisions of section 4078 of the statutes as a basis for the assessment of Kentucky's portion of its intangible property and that none of said property except that which was assessed to, and paid by the ostensibly owning corporations before mentioned, and which amounts so assessed and paid were not the true ones to which the state was entitled." *Commonwealth v. Southern Railway Company*, 193 Ky. 474-475.

The corporation's position on that appeal is thus stated by the court:

"On that appeal the defendant insisted that it was not liable for any franchise tax or taxes on any intangible property sought to be assessed because it does not now nor has it ever exercised any special or exclusive privilege not allowed by law to natural persons in Kentucky; that the only business which it does in Kentucky is to maintain an office for the purpose of soliciting freight and other business for its railroad system out of Kentucky, which is not the exercise of such privilege as subjects it to the character of taxes sought to be recovered, and that the business which is performed in Kentucky, under the character of special privilege mentioned, is conducted solely by other corporations which are separate and distinct from it, and wholly independent of

it." Commonwealth v. Southern Railway Company, 193 Ky. 478-479.

After setting out the facts and the authorities the court then states its own conclusions as follows:

"In the light of the foregoing authorities, and many others which could be cited, and looking at the proposition from a logical and common sense viewpoint, we cannot escape the conclusion that in each of the years involved, defendant, Southern Railway Company, was the owner of and actually operated the lines of the 'Southern Railway Company in Kentucky,' not in its name, but in that of the latter company, which latter was the shadow, but the actual operation was the substance. Defendant could not have more effectually operated these lines if it had done so in its own name. Every act looking to the control and management of them during the times mentioned was set in motion and actually executed by the same brains which conducted the operation of its admittedly owned lines, and the income operation from the Kentucky operation was sent to and presumably disbursed by the same officer who received and disbursed the income from the Southern Railway system proper. The defendant gave out to its stockholders and announced to the traveling public that it owned the lines of the 'Southern Railway Company in Kentucky,' and to allow it to escape taxation on its just proportion of its tangible property subject to taxation in Kentucky, because of the mere shell or hull in whose name it was operating its Kentucky division, would not only be surrendering the substance to the shadow, but would demand of us that we shut our eyes to the facts and thus permit one whom the statute was intended to reach to escape taxation through the disguise produced by the pigment of the Kentucky corporation, and to thereby enjoy in this Commonwealth special privileges not allowed to individuals without contributing its just proportion to the burdens of government. This is a practical age in which we live and facts are regarded more than fiction, and courts recognize

things as they are and not as they appear when clothed in a disguised garb. It is our conclusion, therefore, that the court should have assessed against defendant Kentucky's portion of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the statute." *Commonwealth v. Southern Railway Company*, 193 Ky. 487-488.

On the return of the cases to the lower court, additional pleadings and stipulations of facts were filed and on these the Court of Appeals held that no assessment could be made for the years 1914, 1915, or 1916. So only the assessment for the years 1917 and 1918 are now in controversy. As to these years on the return of the cases to the circuit court, an amended answer was filed and the following additional stipulations filed:

"In view of the defendant's amended answer, the parties hereto by their respective counsel hereby stipulate the following facts as applicable to this case for the purpose of a trial in the circuit court, in addition to the stipulations filed heretofore.

"1. Effective January, 1917, the executive and other officers of the defendant, Southern Railway System, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January, 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans and Texas Pacific Railway Company into the Southern Railway System. Since January, 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked 'Southern,' and at all of the stations of the Cincinnati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them 'Southern Railway System,' and on the caps and uniforms of the conductors there was the word 'Southern.'

"2. The Cincinnati, New Orleans & Texas Pacific Railway Company owns and operates a line of railroad in the State of Kentucky 197.50 miles long. It passes through the following counties and has the following mileage in each;

Kenton County	14.37 Miles
Boone County	9.13 Miles
Grant County	22.45 Miles
Harrison County	2.43 Miles
Scott County	22.21 Miles
Fayette County	13.88 Miles
Jessamine County	15.94 Miles
Mercer County	8.14 Miles
Boyle County	10.42 Miles
Lincoln County	23.83 Miles
Pulaski County	30.99 Miles
McCreary County	23.71 Miles
	<hr/> 197.50 Miles

"It also owned excess outside valuations as follows: for 1917, \$1,019,582.15; for 1918, \$2,046,735.53. Its net operating income was as pleaded in said amended answer. Its total mileage for 1917 and 1918 was 337.27 miles both in and outside this state, and sum is to be added to the total mileage of defendant. For each year it reported to the State Tax Commission in its own name and was so taxed on the basis of the assessments set out in the amended answer.

"The defendant has owned and controlled the C., N. O. & T. P. to the extent set out above and in its amended answer and former stipulation No. 5, is modified to the extent above indicated.

"The C., N. O. & T. P. connected physically with the Southern Railway Company in Kentucky, at Georgetown, Kentucky, Danville, Kentucky, Burgin, Kentucky, and Lexington, Kentucky.

"3. It is further stipulated that plaintiff read at the trial, the printed maps contained in the various stockholders' reports filed.

"4. Former stipulation No. 12 is erroneous. But it is true that the Southern Railway Company of Virginia owned terminals, shops, double tracks outside of the State of Kentucky which constituted an excess valuation for 1917 \$80,160,065.06, for 1918 \$81,845,408.72.

"Former stipulation No. 19 is erroneous. But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at 75% and for 1918 85%."

Stipulation 5 which was modified as above stated was originally in these words:

"Except for the ownership of stock of the four railroads specified in stipulation 1, and except for the equipment detail in stipulation 3, the Southern Railway Company of Virginia owns otherwise no property or lease of any kind in the State of Kentucky, and transacts no business in the State of Kentucky, except the solicitation and routing to their destination of freight and passengers, unless, under the evidence and stipulations, it owns and operates said lines of railroad or any of them, within the meaning of the Kentucky Statutes, and this question is submitted to the court on all the facts."

In addition to this, see the maps filed with the stockholders' reports in which the Southern Railway is printed in red, the Cincinnati Southern in blue, and stock controlled roads operated under a separate management in green, and particularly these words printed on the margin of the maps.

	{ Southern Railway. Cincinnati, New Orleans & Texas Pacific Ry. Alabama Great Southern Railroad New Orleans and Northeastern Railroad Harriman & Northeastern Railroad Northern Alabama Railway }	
Red...		
Blue.		
		Southern Railway System

On the appeal from the judgment entered for the state on these stipulations, the Court of Appeals affirming the judgment for the years 1917 and 1918 said this:

“But it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion herein, and the judgment in that case will therefore be affirmed without further discussion.” *Southern Railway Company v. Commonwealth*, 204 Ky. 390; 264 S. W. 851.

Under the stipulated facts that during these years the Virginia corporation operated the railway running from Cincinnati through Danville, Kentucky, to Chattanooga, Tennessee, plainly it can not be maintained that the corporation was not then doing business in Kentucky. This was the gist of its position on the first appeal. This left only the question whether the line from Danville to Louisville, Kentucky, should be counted in determining the length of its lines in Kentucky. This connected the main line with Louisville and the West. As the Court of Appeals held long before this controversy arose, this was nothing more than the Louisville division of the system. On its printed maps it is given as one of its owned lines and is so set down in its reports to the stockholders. These facts also appear: (1) The Virginia corporation bought and paid for it. (2) All its earnings are paid to the treasurer of that corporation. (3) The officers down to general counsel are identical. (4) The rolling stock by which it is operated is that corporation's; for the original stock held in 1893 must be gone. (5) It routes freight through; this is what makes the line valuable. (6) The name was chosen by it simply for its purposes.

The evasion of the just burden of state taxes is easy if a mere name may defeat their collection. Certainly there is no merit in this defense under the authorities

collected in the opinion of the Court of Appeals, above referred to.

There is no merit in the objection that the judgment adds twenty per cent to the amount of the taxes. This is provided by the statute. It is called in it a penalty, but it is not a penalty in the ordinary sense of the word. It is not designed to punish. Under the statute and under the judgment three-fourths of it or fifteen per cent goes to the relator. These suits to assess omitted property must be brought by relators who hunt up the facts. If they cannot be paid the suits will not be brought, for relators will not take the risk of costs unless they are paid. To say that the state cannot pay them in this way, is to say that no such suits are to be brought. The delinquent taxpayer, it is well settled, must pay the costs. This is only a provision for paying the costs. Only one-fourth or 5 per cent goes to the state and this is less than one year's interest on the taxes. These taxes should have been paid seven years ago. The interest on them would at six per cent be twice as much as the whole twenty per cent. No interest is allowed on the taxes in the judgment. There is nothing here to bring this case within *Missouri R. Co. v. Ault*, 256 U. S. 554, for in that case the judgment for interest for a number of years was sustained.

In addition to this the objection was not made in the court which entered the judgment or on the original hearing in either appeal to the Court of Appeals. It is not noticed by the court in its opinion because it is an afterthought conceived after that opinion was rendered.

Section 15 of the Federal Control Act provides:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may

affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

The provision of the federal statutes that taxes "shall be paid out of the revenue derived from railway operation while under federal control" in nowise affects the state statute making those taxes a lien on the property and making the owner of the legal title and the claimant in possession, responsible therefor, and is no bar to the enforcement of the state's rights under it after federal control has ceased. "The revenue derived from federal control" was insufficient to meet the charges thereon as provided by the federal statute; but clearly the taxes due the state were not for this reason to remain unpaid. The purpose of the federal statute was only to provide a mode of payment of the taxes. But when the taxes were not paid and federal control ceased, the taxes may be enforced just as they would be, if there had been no federal control. The rule is that a temporary statute expiring by its own limitations leaves the law as it was at its enactment.

These cases have been pending for years and it is earnestly submitted that the payment of the state's just taxes should no longer be delayed and that the certiorari should be denied and the writ of error dismissed.

Respectfully,

J. P. HOBSON,

For Defendants in Error.

FRANK E. DAUGHERTY, *Attorney General,*
Of Counsel.

Office Supreme Court, U. S.
F I L E D

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Supreme Court of the United States

October Term, 1924.

Nos. 758 and 759 **218 & 219**

James C. Davis, Director General,
as Agent, - - - - -

Plaintiff in Error

vs.

Commonwealth of Kentucky,
By, &c., - - - - -

Defendant in Error

Southern Railway Company,
vs.

Plaintiff in Error

Commonwealth of Kentucky,
By, &c., - - - - -

Defendant in Error

BRIEF FOR DEFENDANTS IN ERROR

L. W. MORRIS,
D. L. HAZELRIGG,
J. P. HOBSON,

For Defendants in Error.

FRANK DAUGHERTY,
Attorney General of Kentucky,
Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1924

Nos. 758 and 759

JAMES C. DAVIS, DIRECTOR GENERAL,
AS AGENT, - - - - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - - *Defendant in Error.*

SOUTHERN RAILWAY COMPANY, - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY,
BY, &C., - - - - - *Defendant in Error.*

BRIEF FOR DEFENDANTS IN ERROR

By the Kentucky Statutes, Secs. 4077-4081, printed in full in the brief for plaintiff in error on pages 88-94, it is provided that every railway company or other public service corporation shall in addition to the other taxes imposed on it by law annually pay a tax on its franchise; the value of the franchise is ascertained by fixing the total value of all its capital stock and subtracting therefrom the valuation of its tangible property; if the corporation's lines extend beyond the limits of the state,

"that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state bears to the total length of the lines operated, owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable to taxation in this state." The franchise tax is a tax on the intangible property of the corporation. *Henderson Bridge Co. v. Kentucky*, 99 Ky. 623, 166 U. S. 150; *L. & N. R. R. Co. v. Greene*, 244 U. S. 545; *Illinois Central R. Co. v. Greene*, 244 U. S. 555. In providing for a mileage basis in fixing the value in Kentucky, the statute followed the rule often approved by this court. *State railway tax cases*, 92 U. S. 608, 611; *Western Union v. Mass.*, 125 U. S. 520; *Pittsburgh R. Co. v. Backus*, 154 U. S. 421; *Adams Express Co. v. Ohio*, 165 U. S. 194.

Only the years 1917 and 1918 are involved on this appeal. Only these grounds of reversal are urged:

1. The corporation was not doing business in Kentucky.
2. The tax is on property not in Kentucky.
3. The assessment should not be made against the corporation.
4. The 20% penalty should not be adjudged.

We will take up each of these question in the order stated.

1. *Was the corporation operating lines in Kentucky?*

The Kentucky circuit court and the Court of Appeals each held that the corporation during these two years operated in Kentucky both the line from Cincinnati to Chattanooga, known as the Cincinnati Southern and the line from Louisville to Danville, known as the Louisville Southern and there connecting with the Cincinnati South-

ern. Unquestionably these findings are warranted by the record.

There is this stipulation as to the Cincinnati line:

"Effective January, 1917, the executive and other officers of the defendant, Southern Railway Company, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January, 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway system. Since January, 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked 'Southern,' and at all of the stations of the Cincinnati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them 'Southern Railway System,' and on the caps and (fol. 275) uniforms of the conductors there was the word 'Southern.' R. 143."

In addition to this the reports made by the corporation to its stockholders are filed and the accompanying maps. (See additional record.) On these maps the Southern Railway is printed in red, the Cincinnati Southern in blue, stock controlled roads operated under separate management in green and these words are printed on the margin:

Red Blue	{	Southern Railway.	}	Southern Railway System
		Cincinnati, New Orleans & Texas		
		Pacific Ry.		
		Alabama Great Southern Railroad		
		New Orleans and Northwestern Railroad		
		Harriman & Northeastern Railroad		
		Northern Alabama Railway		

When the executive and other officers of the Southern became the corresponding officers of the Cincinnati Southern, plainly the former was merged in the latter.

All the money received went into its treasury and was disbursed by its officers. If it was not operating this line, it was not operating any; for all its lines were controlled by the same officers.

In addition to this is the following allegation in the defendant's answer: (R. 139)

"That in January, 1917, the defendant, Southern Railway Company, controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January, 1917, the defendant Southern Railway Company and the Alabama Great Southern Railroad Company acquired a majority of the capital stock so that the defendant Southern Railway Company could and did control through stock ownership the Cincinnati, New Orleans and Texas Pacific Railway Company from January, 1917, to the present time."

This line was therefore a stock controlled road during the years in question, not operated under its separate management but by the management of the Southern. So it is printed in blue on the maps and included in the Southern System.

These facts bring the case within the rule often laid down by this court in like cases.

"Identity of interest could not be clearer or closer than it was between the defendants in the two cases, they represented precisely the same, single interest, and the Hart Company and Wood, as agents of the Elyria Company, were obviously and necessarily privies to the judgment rendered in its favor in the circuit court of appeals for the sixth circuit." Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294.

"While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control." Southern R. Co. v. Lowe, 247 U. S. 330.

"The management and control of all the operations of the Eastern Company have always been kept in charge of a 'managing committee' of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.

"The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of his salary, and the established practice has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

"Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha Company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employee of either of the two owning companies.

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it, and therefore free to impose separate carrying charges upon the public." *Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assoc.*, 247 U. S. 484.

"The petitioner did not itself do the business of its subsidiaries and have possession of their property, as in *Southern P. Co. v. Lowe*, 247 U. S. 330, 62 L. Ed. 1142, 38 Sup. Ct. Rep. 540, but the principle of that case must be taken to cover this." *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71.

"We recognize the importance of regarding matters of substance and disregarding forms in ap-

plying the provisions of the 16th Amendment and income tax laws enacted thereunder." *United States v. Phellis*, 257 U. S. 156.

"Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company." *Davis Agent v. Alexander*, U. S. Advance Sheets, Dec. 1, 1925, p. 66.

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finessing theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires." *Adams Express Co. v. Ohio*, 166 U. S. 225.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, and other like cases cited in the brief for plaintiffs in error have no application for those cases involved only formal matters and the court there pointed out that a different rule applies in cases "concerning substantial rights." In *Philadelphia, &c., R. Co. v. McKibbin*, 243 U. S. 264, only a question of process served on the president of the corporation while passing through the state, was involved. This is made plain by the court's opening statement.

Certainly if the taxes due the United States cannot be defeated by corporate forms, the taxes due the states cannot be so defeated; and there is much stronger reason for so applying the rule than in the case of a former judgment against the subsidiary or a tort committed by it.

As to the Louisville Southern the admitted facts are these:

1. The Virginia corporation bought the property and paid for it. (R. 58). 2. The system has full authority to and does route over the Kentucky line to destination both freight and passengers. (R. 78). 3. The officers, from president to general counsel, are the same men. (R. 67). 4. The Kentucky line has bought no new rolling stock since 1894; but the parent system has maintained the then existing rolling stock at the same amount without cost to the Kentucky line. (R. 35). 5. All money collected by the Kentucky line was paid into the system's treasury; and by said system disbursed. (R. 41, 67.) 6. From and after January, 1917, the Southern Railway System in its own name, owned and was doing business in the state of Kentucky over the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company and as such owned and was operating 197.5 miles of line into which the Southern Railway in Kentucky terminated. (R. 139, 143). 7. After February, 1917, the whole line was marked at stations and bulletin boards "Southern Railway System." (R. 137).

In its report to its stockholders "Miles of road, June 30, 1917, owned" are these words: (R. 108.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

In its report for 1918 under the "Miles of road owned" are these words: (R. 113.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

How could any court without shutting its eyes to the truth doubt that these two lines were in 1917 and 1918, owned and operated as part of "the Southern System?" So it was that the Court of Appeals disposed of the case in these words:

"But it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion herein, and the judgment in that case will therefore be affirmed without further discussion." *Southern Railway Co. v. Com.*, 204 Ky. 390, 264 S. W. 851. (R. 153.)

The Cincinnati line connecting with its other lines gives it a through line from the whole south to Cincinnati and all the cities north of it. The Louisville line connecting with the Cincinnati lines at Danville, Kentucky, gives it a through line from the whole south to Louisville, Indianapolis, St. Louis and other western cities. The present Constitution of Kentucky took effect September 28, 1891. By section 171 it provided that taxes "shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." The statute levying this franchise tax reading just as it now reads took effect November 11, 1892. The Louisville line was sold under the court's decree on August 16, 1894, and was bought by the Southern Railway Company, which then organized the Southern Railway Company in Kentucky to evade the statute passed about two years before. The statute was upheld by the Court of Appeals sustaining an assessment for 1893 and the judgment was affirmed here, *Henderson Bridge Co. v. Kentucky*, 99 Ky. 625, 166 U. S. 150. *Southern R. Co. in Ky. v. Coulter*, 113 Ky. 657, involved the taxes for 1896. The statute has since been uniformly enforced. Under it all railroad systems whose lines are in part in Kentucky, such as the Illinois Central, the Chesapeake & Ohio and the Louisville & Nashville, pay the tax

after fruitless appeals to this court. Is there any reason why the Southern Railway system should be exempt from the burden all other systems bear? It enjoys every right they enjoy and accomplishes just what they accomplish by reason of through lines and the long haul. These corporations took the Kentucky lines and operated them in their own names. If the Southern had ~~done~~ the same thing, would anyone believe that this controversy would ever have arisen? If not, the only question presented is, can it by a mere corporate form defeat the statute or while really owning and operating these lines can it by the mere name in which it acts escape a tax which it would pay if it did these things in its own name? The question is an important one not only to Kentucky but to nearly every state; for nearly all the states have now similar statutes and it will be ~~easy~~ for every railroad system to do just what this one has done and operate its lines in each state in a different name, and they will do it and so escape franchise taxes in the states where the lines are operated, if this court sustains this appeal. We cannot believe that this court will sustain such a patent evasion, and enunciate a rule that would unsettle and destroy all it has written on the subject in the last fifty years.

The exhaustive opinion of the Court of Appeals on the first appeal is printed in the record, pp. 118-129, and we ask the special attention of this court to it without repeating here the reasons given for the judgment. It is earnestly submitted that to hold otherwise would have been for that court to shut its eyes to the truth and ignore the entire current of authority on the subject.

A different rule was followed by the Court of Appeals as to the years 1914-1916 on the second appeal, because it then appeared that during these years the corporation did not operate, lease or control the Cincinnati line and the Louisville line was not then physically connected with the Southern lines.

2. *Is the property which is taxed in Kentucky?*

In addition to its tangible property a large railroad system must have a large capital sufficient to operate it. This capital as this court has often held is distributed along its lines and is subject to taxation in the states where the lines are operated. There was no taxation here of any property not within Kentucky. The assessment was made just as it would have been made if the corporation had operated the Kentucky lines in its own name, and it is written large on the record, that if it had so operated the Kentucky lines, this case would not be here.

“The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole; and each part of the road contributes, not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts; because there is a value created by and resulting from the combined operation of all its parts as one continuous line.

“Now, when a road runs into two states, each state is entitled to consider, as within its territorial jurisdiction and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road.” *Cleveland C. C. & St. L. R. Co. v. Backus*, 154 U. S. 444.

This court must assume that the Court of Appeals in deciding this case was correct when it said: “But it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion herein.” If there was any doubt about this it is

certainly dispelled by the petition for rehearing filed by the railway company in the Court of Appeals (R. 158), in which no complaint is made of this statement of the court. The only part of the opinion on the former appeal which has any relation to the years 1917 and 1918 is in these words:

“In the light of foregoing authorities, and many others which could be cited, and looking at the proposition from a logical and common sense standpoint, we can not escape the conclusion that in each of the years involved defendant, Southern Railway Company, was the owner of and actually operated the lines of the ‘Southern Railway Company in Kentucky,’ not in its name but in that of the latter company, which latter fact was the shadow but the actual operation was the substance. Defendant could not have more effectually operated these lines if it had done so in its own name. Every act looking to the control and management of them during the times mentioned was set in motion and actually executed by the same brains which conducted the operation of its admittedly owned lines, and the income from the Kentucky operation was sent to and presumably disbursed by the same officer who received and disbursed the income from the Southern Railway System proper. The defendant gave out to its stockholders and announced to the traveling public that it owned the lines of the ‘Southern Railway Company in Kentucky,’ and to allow it to escape taxation on its just portion of its intangible property subject to taxation in Kentucky, because of the mere shell or hull in whose name it was operating its Kentucky division, would not only be surrendering the substance to the shadow, but would demand of us that we shut our eyes to the facts, and to thus permit one, whom the statute was intended to reach, to escape taxation through the disguise produced by the figment of the Kentucky corporation, and to thereby enjoy in this Commonwealth special privileges not allowed to individuals without contributing its just proportion to the burdens of government.

This is a practical age in which we live and facts are regarded more than fiction, and courts recognize things as they are and not as they appear when clothed in a disguised garb. It is our conclusion, therefore, that the court should have assessed against defendant Kentucky's portion of its intangible property assessed by the proportion of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the statute." (R. 127.)

The only ground on which the corporation claimed that it was not subject to the tax and that to levy the tax was to tax property outside of the state was that it was not doing business in the state. The English and American authorities collected by the Court of Appeals in that opinion clearly sustain its conclusion. After that opinion was delivered, additional stipulations were filed under which it was held by the Court of Appeals that for the years 1914, 1915 and 1916 the Louisville line owned and operated by the corporation was not connected with its other lines, and therefore the rule announced by this court could not be applied. So the petition for those years was dismissed, but as it conceded that a different rule obtained as to the years 1917 and 1918 by reason of its operation of the Cincinnati line with which the Louisville line connected, the judgment of the circuit court as to these years was affirmed. The railroad company in neither of the Kentucky courts made the objection which is made here that this was to tax property outside of the state. For it admitted that it was operating the Cincinnati line and the Louisville line was an integral part of it. The objection made here for the first time is in substance that the assessment is too large and that sufficient allowance was not given for its large amount of double tracks and terminals in other states. But if the corporation

really thought this it should have presented this objection in the state circuit court where the assessment was made or in the Court of Appeals where it was reviewed. The court will see that even in its petition for rehearing no such complaint was made and the objection is made here for the first time where no opportunity is given to show that the assessment was fair. The fact is full credit was given for all the double tracks and terminals in other states, at the figures furnished by the corporation itself. Its valuations were not questioned, and these valuations were made with the knowledge that they were to be used in these actions in making the assessment. A very just and fair assessment was made. Certainly the court must assume this when no complaint was made on this score in the court of original jurisdiction.

Plainly as the corporation was operating two lines in Kentucky it was liable to some franchise tax in Kentucky, and there is no showing even now that the amount fixed is excessive. It is entirely immaterial whether the Louisville line made money or didn't make it, counting merely the receipts on that line. It brought to the corporation the business to and from the south, to and from Louisville, Indianapolis, St. Louis and other western cities. Its real value to the corporation was as a feeder. It makes the line appear as operated at a loss, by book-keeping, charging up to it equipment supplied and the like (R. 35, 36), but the system is the thing. The line is a part of the system. Some part of the capital operating the system must be apportioned to the Kentucky lines. What that part should be was a question to be determined by the circuit court. Its decision as to the amount was not only acquiesced in but on appeal to the Court of Appeals was expressly conceded to be correct. The Kentucky Statute does not provide that the mileage shall control in making the assessment. It only provides that it shall be considered. In the absence of any complaint in

the state courts on this subject it must certainly be presumed here that the state courts acted properly and that the assessment is fair.

The Kentucky Statute includes in the system lines "operated, owned, leased, or controlled." It is held that lines held by stock control are included, *L. & N. R. Co. v. Greene*, 244 U. S. 522. In this case the corporation both operated and controlled the Cincinnati and Louisville lines. Such lines out of Kentucky were counted by this court in the above case to lower the proportion of the lines in Kentucky to the whole lines. If they may be so counted, they must be in like manner counted when they swell the proportion in Kentucky. It is earnestly submitted that on the facts plainly some assessment should have been made; that the objection that the assessment is for too much cannot be first made in this court; and that this is in substance the effect of the complaint made here.

The case is wholly unlike the cases cited in brief for plaintiff in error. There is no showing here that any property not within the state was included in the assessment. In *Delaware, &c., R. Co. v. Pennsylvania*, 198 U. S. 341, it was shown that the corporation owned coal of the value of \$1,700,000.00 which was necessarily included in its capital stock upon which the tax was charged. It does not appear here that any property outside of Kentucky was included in the valuation. For all that the record shows every dollar of such property was deducted, as it should have been. This is the distinctive feature of the case, *Louisville, &c., Ferry Co. v. Kentucky*, 188 U. S. 385. The fact that property having its situs in Indiana was included in the assessment, appeared in the record. The same is true of *Wallace v. Hines*, 253 U. S. 66; it did appear that the bonds and land grant having a situs in another state were included in the assessment. In *Union Transfer Line v. Wright*, 249 U. S. 275, it appeared that

more cars under the statute were assessed than were in fact in the state, as shown by express stipulations. In *Illinois Central R. Co. v. Greene*, 244 U. S. 555, the record showed just what method the board used to determine the value of the corporate stock, what they deducted and how they reached the result in question. Nothing of the sort appears here. It does not appear what method the court used or what deductions it made or how it reached the result indicated. The court is asked to speculate and to assume that something was done wrong, when all of this might have been made perfectly clear if the corporation had asked it. Certainly this court must presume that the state court did right until the contrary appears.

In their brief, pages 19-20, counsel give the court their idea as to how the assessment was made, but there is nothing of this in the record and the court will observe that the result they reach is not the result reached in the judgment.

The amount of the assessments made by the judgment is the value of the proportionate part of the corporation's intangible property in Kentucky. If this was figured by capitalizing the income as suggested by counsel, the amount of the income allocated to Kentucky may be had by dividing each assessment by $16 \frac{2}{3}$. Such a result shows that the allocation was not unreasonable.

The receipts on the Louisville line do not measure its value. If a car of freight is shipped from Louisville to New Orleans and the rate is \$5.00 to Danville, Kentucky and \$100.00 from Danville to New Orleans, what the Louisville line brings in is not \$5.00 but \$105.00. The same thing is true of shipments from the far south to Louisville, Indianapolis, etc.

The logical effect of the argument for plaintiff in error is that if a corporation did business in New York and ten other states, and it showed by its books that it only made a surplus in New York, it should pay a fran-

chise tax only in New York. This would be to ignore all the advantages accruing from the operation of the system as a whole and to upset entirely the system plan of taxation as to which all the authorities are in absolute accord.

3. *Was the assessment properly made against the corporation?*

By sections 4021 and 4023, Kentucky Statutes, which are printed at the back of this brief, it is provided that the state shall have a lien on the property assessed for the taxes due thereon, and that the holder of the legal title, the holder of the equitable title, the claimant or bailee in possession of the property shall be liable for the taxes thereon, but as between themselves it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon. The assessment here was directed to be made May 20, 1922. (R. 144.) The liability was then fixed, no assessment may be made until that judgment is carried into effect. At that time federal control had terminated and the property was in the possession of the railway company. It was its property and in its possession. The state had a lien on the property for the taxes so directed to be assessed and the claimant in possession or equitable owner is liable for the taxes. Here the real owner was in possession when the judgment was entered. The state could not enforce its lien upon the property unless the railway company was a party to the suit, it was therefore proper that the railway company should be made a party to the suit and the judgment against it was proper, for otherwise the state could have looked to nobody for its taxes but the Director General and he simply represents the United States government, which cannot be sued, except by its consent. Congress may repeal the Federal Control Act tomorrow and leave the state without any remedy but for its lien on the property and its right to collect from the person in possession

when the assessment is made. Section 15 of the Federal Control Act provides:

“That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds.”

As the Federal Control Act did not repeal, impair or affect the existing laws or powers of the states in relation to taxation, the Kentucky Statutes were not affected thereby. The provision as to the payment of the taxes from railway operation is only a provision for a mode of payment; when the taxes are not so paid under the express letter of section 15 the taxes may be enforced just as they would be if there had been no federal control. The cases cited for the plaintiff in error on this subject are in no wise in point. They were not tax claims arising two years after federal control ceased. The very purpose of section 15 was that the states might collect their taxes as before and should not be required to look alone to the federal government for them. Otherwise the state government might be unable to exist, for it could not enforce payment by the federal government. As we see it this is a question turning simply on the proper construction of the state statutes, which were expressly left unaffected by the Federal Control Act, and being only a question of the construction of the statutes of the state, this court will follow the construction of the statutes given by the highest state court.

But if we are mistaken about this, plainly this objection is made too late. It was first presented to the Court of Appeals in the petition for rehearing. (R. 158.) It was not noticed by the Court of Appeals of Kentucky for the petition was overruled without any response.

Nothing is better settled than that where the federal question was first raised in a petition for rehearing, and the state court refused to consider it, this court will not consider it on writ of error. *Clay Center, &c., Co. v. Clay Center, &c.*, 212 U. S. 564; *Rooker v. Fidelity Trust Co.*, 261 U. S. 114; *Live Oak Assoc. v. Railroad Commission*, U. S. Advance Sheets, Feb. 1, 1926, p. 167.

4. *Was the 20% penalty properly adjudged?*

This question like the last was first made in the petition for rehearing, and, under the authorities above cited, is not before this court, for the record must show, as often held by this court, that the question was presented to the state court.

We therefore feel that this brief might stop here, but the fact is the objection is wholly without merit.

While the twenty per cent is called a penalty in the statute, it is provided that fifteen per cent goes to the officer prosecuting the proceeding for his services and only five per cent goes into the treasury. The same provision is made in the judgment appealed from (Record 144). The cost of the collection must be borne either by the state or by the taxpayer. It is only just that he should pay this cost, rather than the other taxpayers of the state. To this extent, the twenty per cent though called a penalty is simply a provision for costs. The remaining five per cent goes into the treasury and is the only interest the state receives on its delayed taxes. In the *Ault* cases interest at six per cent per annum on the amount found due was allowed against the Director General from July 29, 1918, until paid. In this case all the interest charged for a greater delay is five per cent. This is certainly not punishment. It is only compensation for the delay in payment and is less than one year's interest. In fact the twenty per cent is less than the interest allowed in the

Ault case for the delay. To call this punishment is to trifle with words. The penalties held not enforceable in the Ault case are thus there defined:

“But double damages, penalties and forfeitures which do not merely compensate but punish, are not within the purview of the statute.” The Owens case, 256 U. S. 225, is to same effect.

The twenty per cent here simply compensates the officer for his services and the state for the interest it has had to pay on the state warrants. The fact is the state is not made whole. In the Ault case, Ault got his \$50.00 with legal interests. He was only denied \$390.00 as a penalty in addition to this. The penalty was practically seven times the amount of his claim. That was plainly punishment, but not so is a provision for payment of costs and five per cent for delay in paying taxes.

“It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose on the taxpayer penalties for non-compliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, cannot be doubted. And if the state is compelled to resort to legal proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case.” 26 Ruling Case Law, p. 386, sec. 344.

To deprive the officer of compensation in these proceedings is to nullify the statute authorizing such proceedings, for certainly officers will not so act without pay. They are liable for costs if unsuccessful. Plainly the statute does not mean that the state shall be without remedy in this class of cases.

Federal control began on the 27th day of December, 1917, and ended on the 1st day of March, 1920.

This is a mere assessment proceeding. It was proper to make the railroad company and the Director General defendants that both might be heard. The judgment properly made the assessment against both. This was for the protection of the company. Their rights as between themselves may be settled when their accounts are settled.

The whole spirit and purpose of the control act in relation to taxation was to provide against any conflict with the existing taxing laws or powers of the state. The state may collect its taxes and the reasonable costs of collection are a part of the tax, so is interest on taxes delayed in payment. The allowance of twenty per cent in cases like this was provided for by the state laws for this reason. The Federal Control Act in providing that it should not affect, amend, repeal or impair the tax laws of the state necessarily leaves unaffected the taxes and the rights of the state incidental to their non-payment, such as the right to cost and interest for the delay. The Federal Act was aimed at the removal of such things only as interfered with its designated purposes. The taxation of this property was provided for under the laws of the state that then existed and those laws also provide for the payment of the costs and compensation for the delay. Under no stretch of the imagination can it be contended that taxation of railroad property impeded the movement of troops or material. Therefore the Federal Control Act has no bearing whatever on this case. Especially is this true since the assessment here was made long after Federal control ceased. These taxes do not bear interest in Kentucky.

To sustain this point is to hold that the cost of the delayed assessment must be borne by the other taxpayers of the state and not by the property taxed, and that no

allowance may be made to the state for interest on the taxes the payment of which has been delayed.

Certainly neither of these positions can be maintained, as to the corporation or the Director General.

Respectfully submitted,

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For Defendants in Error

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KENTUCKY STATUTES.

"The Commonwealth, and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively (for five years) which shall not be defeated by gift, devise, sale, alienation or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively in the manner provided for by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime." Kentucky Statutes, Sec. 4021.

"The holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the first day of July of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of payment." Kentucky Statutes, Sec. 4023.

"All persons owning property which may be assessed as herein provided, shall, in addition to the taxes, pay the costs of the proceedings and a penalty of twenty per centum (20%) on the amount of the state and county taxes due, except where such property shall have been duly listed by the owner, thereof. The taxes, costs and penalties shall be collected and accounted for as other taxes and penalties are required to be collected, and by the same officers. As compensation for his services in causing such property to be assessed, the officer filing the

statement shall be entitled to seventy-five per cent (75%) of the penalty of twenty per centum (20%) upon both state and county taxes, to be paid to him by the Auditor of Public Accounts, to whom the collecting officer shall pay the whole of said twenty per centum (20%) penalty, and the remaining twenty-five per cent (25%) of the twenty per centum penalty shall be credited to a back tax reserve fund, out of which the salary and expenses of the supervisor of revenue agents and the salary of his clerk shall be paid as hereinbefore provided." Kentucky Statutes, Sec. 4260.

SUPREME COURT OF THE UNITED STATES.

Nos. 33 and 34.—OCTOBER TERM, 1926.

Southern Railway Company, Plaintiff
in Error,

33

vs.

Commonwealth of Kentucky.

James C. Davis, Director General,
Plaintiff in Error,

34

vs.

Commonwealth of Kentucky.

In Error to the Court of
Appeals of the State of
Kentucky.

[April 11, 1927.]

Mr. Justice BUTLER delivered the opinion of the Court.

A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of certain lines of railway was affirmed by the highest court of that State. 204 Ky. 398. And see 193 Ky. 474. Reversal is sought on the ground that as applied these laws contravene the due process clause of the Fourteenth Amendment.

The statutes* (§§ 4077-4081) provide that every foreign or domestic railway company, in addition to other taxes imposed by law, shall pay an annual tax on its franchise. The provisions apply whether the privilege is exercised by the corporation in its own name or in the name of another which it adopts. A company's railway system is deemed to include lines operated, leased or controlled whether technically owned or not. The tax is on intangible property. Where the railroad is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last

*The provisions are printed in the margin of *Louis. & Nash. R. R. Co. v. Greene*, 244 U. S. 522, at page 533.

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ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. When the railroad is wholly within the State, the capitalized net, less the assessed value of tangible property on which other taxes are paid, is taken to be the value of intangible property. *Greene v. Louis. & Interurban R. R. Co.*, 244 U. S. 499, 510, and cases cited; *Louis. & Nash. R. R. Co. v. Greene*, 244 U. S. 522, 539.

Plaintiff in error, the Southern Railway Company, is a Virginia corporation. The lines of its system of railroads, exclusive of the Kentucky mileage in question, exceed 9500 miles and extend from Washington, D. C. into Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama and Mississippi. The company also has a line from New Albany, Indiana, to East Saint Louis, Illinois. It does not own any railroad in Kentucky. The "Southern Railway Company in Kentucky" owns 127.63 miles, all of which are in that State. Its branches connect with the line of the Cincinnati, New Orleans and Texas Pacific Railway Company which extends from Cincinnati to Chattanooga and connects it with the system. Its stock is owned by the Virginia company. The same persons are officers of both. The lines of the Kentucky company are reported to public authorities and are advertised as a part of the system. The Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company own, in all, about 53.3 miles of railroad in Kentucky, but their lines are not connected with the lines of the Southern Railway Company in Kentucky. The Virginia company through stock ownership controls these companies; but they and the Southern Railway in Kentucky, in their own names and as owners, made reports and paid in full all taxes assessed under Kentucky laws on their tangible and intangible properties.

The Commonwealth brought this suit against the Virginia company and the Director General to recover additional franchise or intangible property taxes for 1918 and 1919 in respect of the Kentucky mileage of these companies. The Court of Appeals held that there was no such connection or unity of use between the system of the Virginia company and the lines of the Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway as would justify recovery of any franchise taxes in respect of their

Kentucky mileage. Stipulated facts tended to show that the Virginia company controlled the Cincinnati, New Orleans and Texas Pacific; and the court held that by means of its lines the railroad of the Southern Railway in Kentucky was so connected with the lines of the Virginia company as to be a part of the system. The value of intangible property adjudged to have been omitted, and on which the additional franchise taxes were calculated, for 1918 was \$1,730,090.02 and for 1919 was \$3,028,592.62. These amounts were arrived at as follows: the net railway operating income for the entire system was capitalized at seven per cent; there was deducted an amount to cover the value of shops, terminals and double tracks outside Kentucky in excess of corresponding tangible property connected with the lines in that State; there was allocated to Kentucky such proportion of the remainder as 424.61 miles, which were attributed to Kentucky, bore to the total mileage of the system; that amount was equalized for taxation at 75 per cent. for 1918 and at 85 per cent. for 1919; and from the result there was deducted the values of tangible and intangible property (including the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific) on which taxes had been paid. But the average value per mile so deducted was less than the system average per mile. The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway Company in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans and Texas Pacific. The increase per mile for 1918 was \$5,334.55 and for 1919 was \$9,338.34.

The Court of Appeals rightly declared that a State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and used to carry on commerce among the States; that, where property is a part of a system and has its actual use only in connection with other parts of the system, that fact may be considered even though other parts of the system are outside the State; that the State may not tax property outside its jurisdiction belonging to one domiciled elsewhere, and that the mileage basis of apportionment cannot be adopted in the taxation of railroad franchises where the result is shown to be arbitrarily excessive. These propositions are derived from the decisions of this Court. *Fargo v. Hart*, 193 U. S. 490, 499; *Pittsburgh, &c. Railway Co. v. Backus*, 154 U. S. 421, 427-431; *Union Tank Line*

Co. v. Wright, 249 U. S. 275, 282; *Wallace v. Hines*, 253 U. S. 66, 69.

The question is whether the State made valid application of the governing principles. The value of tangible property is not involved in this case. The demand of the Commonwealth against the plaintiffs in error was for taxes on intangible properties over and above the amounts that had been paid by the owning companies. And the entire amount added as a basis for additional taxes is attributable only to the lines of the Southern Railway Company in Kentucky. There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad and the Cumberland Railway were held not to be a part of the system. Plaintiffs in error insist that the enforcement of the taxes on these amounts, as measuring the additional values of intangible properties inhering in the lines of the Southern Railway Company in Kentucky, operates to tax the property of the Virginia company located beyond the borders of Kentucky and that such amounts are arbitrarily excessive.

The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. *Smyth v. Ames*, 169 U. S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable having regard to traffic available and competitive and other conditions prevailing in the territory served. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. See *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202.

The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of \$13,555 per mile for 1918 and of \$23,730 for 1919. The 1917 aver-

age net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was \$3,642 per mile for 1917 and was \$3,623 for 1918. The corresponding net income per mile of the Southern Railway Company in Kentucky for 1917 was \$878. There was a loss of \$4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of \$1,230 per mile per year.

If considered alone, the railroad of the Southern Railway Company in Kentucky would be a losing venture. Its operating loss was more than \$157,000 per year for the average of the five years reported in the record. But, assuming it a part of the system, it is right to take into consideration the parts outside the State that are operated in connection with it. The mileage used as an integral part of a railroad system may have elements of value that it otherwise would not possess, and the State properly may have regard to the whole in order to ascertain the value of the part that is within its borders. *Fargo v. Hart, supra*, 499. But, if the method pursued in valuing property within the State is arbitrary and the resulting valuation is grossly excessive, the tax must be condemned as in contravention of the due process clause of the Fourteenth Amendment. *Union Tank Line Co. v. Wright, supra*, 282, and cases cited. It is not permissible for the State to take into account any of the outside property "unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace v. Hines, supra*, 69.

The operating results of the system compared with those of the Southern Railway Company in Kentucky show that, on the basis of valuation adopted by the State, the average value per mile of the lines of that company is very much less than the average value per mile of the system. If taken separately it is clear that, because of lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad of that company. In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. To sustain the addition for 1919, it is necessary to take enough to overcome the deficit of \$4,741 per mile plus a fair return on the value of the physical property and on the \$23,730 per mile fixed

as a basis for additional taxes. The draft on earnings from other parts of the system to sustain the increase for 1918 would not be so heavy. But it is equally obvious that there is no foundation for the finding that there existed in these lines intangible values of \$1,730,090 or any other substantial amount in excess of the value fairly to be attributed to the physical elements of the railroad. If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than \$200,000,000 for 1919 and more than \$120,000,000 for 1918. Clearly there is no foundation for any such results. The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it cannot be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the State. And as the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount adjudged to have been omitted was arbitrarily excessive and included values of system property beyond the limits of Kentucky.

Moreover, the percentages used to make the apportionment to Kentucky were too high. Reference to the figures for 1919 will be sufficient. There was taken 4.273 per cent. of \$432,326,444.12, the system value to be apportioned. The system mileage was 9939.1, and that used for the apportionment was 424.61. The Southern Railway Company in Kentucky had 127.63 miles, the Cincinnati, New Orleans and Texas Pacific, 197.5, the Mobile and Ohio, 38.693, the Cumberland Railroad, 12.9, and the Cumberland Railway, 1.74. As the court held that the lines of the three companies last mentioned were not so connected with the system that plaintiffs in error were liable in respect of them, their mileage was erroneously included in the factor used for apportionment to the lines taxed. And for the reasons stated the mileage of the Cincinnati, New Orleans and Texas Pacific should not have been included. The mileage used to make the apportionment was more than three times that of the Southern Railway in Kentucky, and was more than thirty per cent. in excess of the combined mileage of that company and the Cincinnati, New Orleans and Texas Pacific. Obviously deduction of the lesser values of the Kentucky mileage on which the owners had paid taxes did not eliminate the error.

The enforcement of the franchise taxes so assessed would violate the due process clause of the Fourteenth Amendment.

The Commonwealth asserts that in the Kentucky courts the company did not make "the objection which is made here that this was a tax on property outside the State." But the record shows the contrary. The petition alleged that a portion of the Kentucky franchise had been omitted from assessment and prayed that such portion be assessed and taxed. The answer of plaintiffs in error not only denied liability and alleged that to hold the company liable and to attempt to add to that assessment would be a violation of the Fourteenth Amendment, but it also stated: "Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of . . . the Constitution of the United States, particularly the Fourteenth Amendment thereof." In its first decision (193 Ky. 474), the Court of Appeals said (p. 488): "It is our conclusion, therefore, that the court should have assessed against defendant [Southern Railway Company of Virginia] Kentucky's portion of the intangible property assessed by the proportion of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the statute. But it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." Then follows the court's answer to that contention. This shows that the court distinctly recognized and passed upon the contention that the imposition of the additional franchise taxes would be to tax property outside Kentucky. That decision, according to the local rule, not only bound the lower court, but controlled the disposition of the case on the second appeal. *Hopkins v. Adam Roth Grocery Co.*, 105 Ky. 357, 358. The objections were reiterated in an amended answer filed after the first decision. And the Court of Appeals in its second decision declared that the additional assessments "were made in accordance with and are concluded by the former opinion herein." Clearly, the objections made in the state courts were sufficient. They went to the point that, as proposed to be applied and enforced, the state statutes would operate to tax property outside and beyond the jurisdiction of Kentucky in

contravention of the Fourteenth Amendment. And, notwithstanding these objections, the Court of Appeals in its first decision directed the making of these additional assessments; and, in its second decision, declared that they had been made as directed and affirmed the judgment of the Circuit Court by which they were determined.

A petition for certiorari was filed, but, as the case is properly here on writ of error, the petition will be denied.

*Judgment reversed on writ of error.
Petition for certiorari denied.*

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 33 and 34.—OCTOBER TERM, 1926.

Southern Ry. Co., Plaintiff in Error,	} In Error to the Court of Appeals of Kentucky.
33 <i>vs.</i>	
Commonwealth of Kentucky.	
Andrew W. Mellon, Director General,	
34 <i>vs.</i>	
Commonwealth of Kentucky.	

[April 11, 1927.]

Mr. Justice BRANDEIS, dissenting.

I do not consider the merits of this case, because, in my opinion, it should be affirmed on a point of practice which was urged here by the Commonwealth. On writ of error to a state court, even where, as here, this Court has jurisdiction, no objection is reviewable which was not made there. The question on which the judgment of the Court of Appeals of Kentucky is reversed was not raised or passed upon below.

The claim made below was that the Southern could not be taxed at all in Kentucky under the unit rule and that, therefore, the statute as applied was void. *Dahne-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 288-290. The Commonwealth admitted that the Southern, a Virginia corporation, did not own the Kentucky lines directly. The Southern admitted that it controlled them by stock ownership. In support of the claim that the unit rule could not be applied, the Southern made two contentions. The first was dealt with by the Court of Appeals in its first opinion, 193 Ky. 474; the second, in its second opinion, 204 Ky. 388. The first contention was that the unit rule could have no application, because the Southern was not doing business in Kentucky. That contention the Court of Appeals decided against the Southern for all the years; and this Court affirms the ruling. The second contention was that the unit

rule did not apply, because there was not unity of use and operation of the Kentucky lines with its lines elsewhere. The question depended upon the amount of control exercised by the Southern Railway Company over the C., N. O. & T. P. Railway, which connected the Southern Railway in Kentucky with the rest of the Southern system. This contention the Court of Appeals decided in favor of the Southern for the years 1914, 1915 and 1916; but against it for the years 1917 and 1918. With this ruling also this Court agrees. The reversal by this Court is based on an entirely different claim. It is on the ground that the method of assessment used was such as to furnish, as a basis for the franchise tax, an amount so unreasonable and arbitrary as to involve taxation of property outside the State, in view (1) of the fact that the per mile earnings of the entire system were so much larger than the per mile earnings of the Southern in Kentucky, and (2) of the supposed use of too large a percentage intended to represent the proportion of the mileage in Kentucky to the total mileage of the system.

The Court of Appeals recognized clearly that it could not tax in Kentucky any property outside its limits. It upheld the tax as an increase of assessment upon property located confessedly in Kentucky, applying the rule of *Pullman Co. v. Richardson*, 261 U. S. 330, 338, that "if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system."

Applying the unit rule, however, there are two grounds on which a decision sustaining the claim that property outside the State has been taxed might have rested, if the appropriate claim had been made below. It might have been held that the statute, so far as it required the adoption of the mileage plan of valuation, was void as applied, because the different character of the lines outside Kentucky precluded the application of the per mile method as a basis of valuation. Compare *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hines*, 253 U. S. 66, 69. Or it might have been held that the tax was void, because the additional assessment based on mileage without the State was so arbitrary and unreasonable in amount as to violate due process. Compare

Union Tank Line Co. v. Wright, 249 U. S. 275; *Wallace v. Hines*, 253 U. S. 66, 69-70. But neither of these claims was made in the court below. The only contentions made there were those which this Court and the lower court agree in holding unfounded—namely, that the Southern was not doing business in Kentucky and that there was no such unity of use and operation of the lines within and those without the State as to permit of the application of the unit rule.¹

The second opinion of the Kentucky Court of Appeals recites that "it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by our former opinion." Hence it was necessary for the plaintiff-in-error to show that the objections insisted upon in this Court were raised upon the first trial or the appeal in the state court.² A consideration of the entire answer and of the entire first opinion make it altogether clear that the contention, which was advanced by the answer and refuted by

¹The reason urged by the Southern in support of the second contention was, as the second opinion recites, that the Kentucky lines "had neither physical nor operative connection with lines outside of the state . . . and that to apply the notion of organic unity to all its lines under such circumstances is violative of the Fourteenth Amendment of the Constitution of the United States, in that it brings into Kentucky for taxation purposes values wholly outside of the state. Whether or not this is true is the sole question presented for decision upon these appeals." The Court of Appeals decided the second contention in favor of the Southern for the years 1914, 1915 and 1916, because it concluded "that there was in fact no physical connection between the Northern branch and the Southern branch of the defendant's lines, and that despite the defendant's ownership and control of both of these separate branches, they cannot, under the many decisions of the Supreme Court of the United States, be considered as parts of a single system for the purpose of ascertaining the value of defendant's franchise employed in Kentucky without violating the Fourteenth Amendment of the federal Constitution." It held the Southern taxable for the years 1917 and 1918 because in 1917 the "defendant acquired the C. N. O. & T. P. Ry. Co., and thus unified all of its holdings into a single unit of use and management." In considering the situation for the earlier years it stated: "The question for decision then finally narrows to whether for the purpose of valuing defendant's franchise employed in Kentucky, the line from Danville, Kentucky, to St. Louis, Mo., is to be considered as a separate unit or as a part of a system including also defendant's eastern and southern lines."

²As showing that they were raised, this Court relies upon the allegation of the answer that "the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, prop-

the opinion, consisted solely of the claim that any assessment against the Southern would be unconstitutional as taxing property outside the State because the Southern was not doing business within the State. Neither the record nor the opinion of the Court of Appeals discloses that there was an objection to the assessment as such. Nowhere in the opinion is there any reference to the figures urged here as showing the arbitrariness of the statute as applied.

It cannot be said "that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." *Dewey v. Des Moines*, 173 U. S. 193, 200. The rule that a claim or right which was not asserted in the state court cannot be deemed to have been denied, and hence cannot be insisted upon in this Court has been long established.² It is true also that the party defeated upon a federal question in a state court will not be limited in this Court to the same arguments upon that question, *Dewey v. Des Moines, supra*, at p. 198; and that, if the federal question is properly raised, it is immaterial that the state court may have refused to discuss the point. *Erie R. R. Co. v. Purdy*, 185 U. S. 148, 154. But if the contention made below differs from the contention made here to such a degree that the decision upon one would not necessarily conclude the other, the raising of one below will not permit the raising of the other here.

erty not in Kentucky: . . . that to do this would be in violation of . . . the Fourteenth Amendment", and upon a quotation from the first opinion of the Kentucky Court of Appeals to the effect that "it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." The reliance of this Court appears to rest upon a misapprehension. On the first trial, the lower courts dismissed the State's petition. As no method of assessment was before the Court of Appeals, it could not, in its first opinion, have passed upon the arbitrariness of this or any other method of assessment. See 193 Ky. 474, 489.

²In 1836 Mr. Justice Story, because of the fact "that a different impression exists at the bar", reviewed all the cases that had reached this Court from the state courts, finding that they exhibited "an uniformity of interpretation . . . which has never been broken in upon", requiring that, in order to give the Court jurisdiction, the question sought to be reviewed had both to be raised in the court below and there decided. *Crowell v. Randall*, 10 Pet. 368, 392, 398. By 1894 Chief Justice Fuller regarded such principles as "axiomatic". *California Powder Works v. Davis*, 151 U. S. 389, 393. The rule is still inflexible. *New York v. Kleinert*, 268 U. S. 646.

even if the same provision of the Constitution be the basis of both claims. Compare *Dewey v. Des Moines supra*; *Marvin v. Trout*, 199 U. S. 212, 223-224, 227.

The importance of the rule of practice is illustrated by the case at bar.* Because the reasonableness of the method of assessment was not questioned below, there is nothing in the record to show what figures and what method of calculation were used by the taxing officers. The figures adopted by this Court are presented only in the brief of the plaintiff in error. They are protested by counsel for the Commonwealth. Moreover, there is reason to believe that the inferences drawn from them are unsound.

*Compare *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 636; *National Bank v. Commonwealth*, 9 Wall. 353, 363; *Edwards v. Elliott*, 21 Wall. 532, 557; *Wilson v. McNamee*, 102 U. S. 572; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 633; *Bolln v. Nebraska*, 176 U. S. 83, 90; *Chapin v. Fye*, 179 U. S. 127; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Cox v. Texas*, 202 U. S. 446, 452; *Montana v. Rice*, 204 U. S. 291, 301; *Hunter v. Pittsburgh*, 207 U. S. 161, 180; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112; *Illinois Central R. R. Co. v. Mulberry Coal Co.*, 238 U. S. 275, 281; *Bullen v. Wisconsin*, 240 U. S. 625, 632; *Hiawasse River P. Co. v. Power Co.*, 252 U. S. 341. Compare *Virginian Ry. Co. v. Mullens*, 271 U. S. 220.